TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1[redacted] 1917

No. [redacted] 146

THE UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN OF THE OMAHA TRIBE OF INDIANS, AND OF ROSE WOLF SETTER, A MEMBER OF SAID TRIBE, PETITIONER,

v.

HIRAM CHASE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT.

PETITION FOR CERTIORARI FILED APRIL 11, 1918.
CERTIORARI AND RETURN FILED JULY 6, 1918.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 447.

THE UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN OF THE OMAHA TRIBE OF INDIANS, AND OF ROSE WOLF SETTER, A MEMBER OF SAID TRIBE, PETITIONER,

v.

HIRAM CHASE.

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INDEX.

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December term, A. D. 1914, of said court, before the Honorable Walter H. Sanborn and the Honorable Walter I. Smith, circuit judges, and the Honorable Jacob Trieber, district judge.

Attest:

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the 15th day of April, A. D. 1914, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the District of Nebraska was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Hiram Chase is plaintiff in error and the United States of America as trustee and guardian of the Omaha Tribe of Indians, and of Rose Wolf Setter, a member of said tribe, is defendant in error, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 UNITED STATES OF AMERICA AS TRUSTEE AND guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe,
vs.
HIRAM CHASE. } No. 95 "Y."

Pleas before the District Court of the United States within and for the District of Nebraska, Omaha Division, at the September, 1913, term thereof, before Hon. Page Morris, judge.

Be it remembered, that on the 7th day of May, A. D. 1908, there was filed in the above entitled action a petition in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

UNITED STATES OF AMERICA, AS TRUSTEE AND guardian of the Omaha Tribe of [Tribe of] Indians and of Rose Wolf Setter, a member of said tribe, PLAINTIFF,
vs.
HIRAM CHASE, DEFENDANT. } Case No. 95 "Y."

Petition.

The United States of America, as trustee for the Omaha Tribe of Indians and for Rose Wolf Setter, an Omaha Indian and a member

of said tribe, plaintiff, by Charles A. Goss, United States attorney for the District of Nebraska, and A. W. Lane, assistant United States attorney for the District of Nebraska, brings this its action against Hiram Chase, a resident and citizen of the State of Nebraska, and alleges:

First. That the Omaha Tribe of Indians is and for many years last past has been resident upon and occupying the Omaha Reservation, situate within the counties of Burt, Cuming, and Thurston, in the State of Nebraska.

Second. That said Indian reservation was located and established under treaties with said Indian tribe and acts of Congress in or about the year 1854, and the lands comprising said reservation, ex-
2 cepting certain tracts thereof which have been sold and conveyed under the provisions of act of Congress of May 27, 1902, have ever since said time been and remained in the exclusive use and occupancy of said tribe of Indians; that the legal title to said lands, with the exception of those tracts sold and conveyed under act of Congress of May 27, 1902, as aforesaid, has always been and now is in the United States, and said tribe collectively in its tribal organization and individually has had only the exclusive right to the possession and occupancy of said lands under the direction, control, and supervision of the Secretary of the Interior of the said United States.

Third. That the plaintiff holds the title and control of said lands in trust for said Omaha Tribe of Indians collectively and individually as their rights have been from time to time determined by the Secretary of the Interior of the United States and by the several acts of Congress passed in relation thereto, and is charged with the duty of protecting the rights of said tribe and the individual members thereof in the use and occupancy of said lands, and in and to the rents and profits arising therefrom.

Fourth. The following described lands, to wit: The southwest quarter of the southeast quarter of section twenty-five (25), township twenty-five (25), range nine (9), were and are a part of said Omaha Indian Reservation, respecting which the plaintiff is charged with the duty of protecting and enforcing the rights of said tribe thereto as aforesaid; that said lands prior to the year 1899 had never been allotted to any individual member of said tribe or otherwise disposed of, but remained the common property of said tribe; and that said tribe, in its tribal organization, was entitled to the exclusive use of said lands and to the value of said use from and after the establishment of said reservation, as aforesaid, to and including said year 1899; that the reasonable value of said use during the whole of said period was not less than fifty cents per acre for each and every acre thereof.

Fifth. That on August 7, 1882, the Congress of the United States passed an act providing for the allotment in severalty to members of the Omaha Tribe of Indians of lands of said Omaha Indian Reservation, said act containing, among other provisions, in the sixth

section thereof the following: "That the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States shall convey
3 the same by patent to said Indian or his heirs, as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." Said act further provided that the foregoing stipulation contained in said sixth section should be recited in each and every certificate or patent to individuals who should receive allotments under and according to the provisions of said act.

Sixth. That in or about the year 1899 and under and in pursuance to said last mentioned act the lands hereinbefore described were, by the President of the United States, acting through the Secretary of the Interior of the said United States, duly allotted in severalty to one Reuben Wolf, then a member of said tribe and entitled to an allotment from the lands of said reservation, in accordance with the provisions of said act, and that thereafter, to wit, on the 7th day of March, 1902, a trust patent therefor was duly issued to the said Reuben Wolf, which trust patent provided, among other things, as follows, to wit, "That the United States of America, in consideration of the premises and in accordance with the provisions of the sixth section of said act of Congress of the seventh day of August, anno Domini one thousand eight hundred and eighty-two, has given and granted, and by these presents does give and grant unto the said E-in-ga-be-, or Reuben Wolf, and to his heirs the tract of land above described, but with the stipulation contained in the said sixth section of said act of Congress, that this patent "shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States shall convey the same by patent to said Indian or his heirs as aforesaid in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

That from and after the allotment of said land to the said Reuben Wolf, in the year 1899, the said Reuben Wolf and his heirs were entitled to the sole and exclusive use of said land; that the reasonable value of the use of said land and the fair rental value thereof during the whole of said period until the present time was and is not less than one and 25-100 ($1.25) dollars per acre.

4 Seventh. That after the allotment and patenting of said land to the said Reuben Wolf, as aforesaid, and on or about

the 10th day of August, 1899, the said allottee died, leaving as his sole heir to said allotment his widow, Rose Wolf Setter, hereinbefore named, and that the said Rose Wolf Setter has been rightfully entitled to the exclusive use of said lands and to the rents and profits therefrom to the present time.

Eighth. That on or about the year 1885, the defendant Hiram Chase, without any right or authority whatever, wrongfully entered and trespassed upon and took and remained in exclusive possession of said lands, and ever since said time has continued to use and occupy the same, to the exclusion of said Omaha Tribe of Indians and the said Reuben Wolf and the said Rose Wolf Setter, and has failed and refused and still fails and refuses to account to this plaintiff or to the said Omaha Tribe of Indians or to the said Rose Wolf Setter for the use of said lands or for the rents or profits arising therefrom, or any part of the same, although often requested so to do.

Ninth. That there is now due and owing from the defendant to the plaintiff, as trustee for the said Omaha Tribe of Indians, for the use of said tribe in its tribal organization, the sum of three hundred ($300.00) dollars, with interest thereon amounting to the sum of one hundred ninety-two ($192.00) dollars; and there is due and owing from the said defendant to the plaintiff, as trustee for the said Rose Wolf Setter, the sum of four hundred fifty ($450) dollars with interest thereon amounting to the sum of seventy-two ($72.00) dollars.

Wherefore the plaintiff prays judgment against said defendant in the sum of one thousand fourteen ($1,014) dollars and costs of suit.

CHARLES A. GOSS,
United States Attorney.
A. W. LANE,
Assistant United States Attorney.

UNITED STATES OF AMERICA,
District of Nebraska, Lancaster County, ss.

A. W. LANE, being first duly sworn, deposes and says that he is the assistant United States attorney for the District of Nebraska; that he has read the foregoing petition and that the facts therein stated are true as he verily believes.

A. W. LANE.

5 Subscribed in my presence and sworn to before me this 6th day of May, 1908.

[SEAL.] HELEN HANDSAKER, *Notary Public.*

Endorsed: Petition. Filed May 7, 1908. Geo. H. Thummel, clerk.

Demurrer to answer.

Comes now the United States of America, plaintiff in the above cause, and demurs to the third, fourth, fifth, sixth, seventh, and eighth paragraphs of the answer of the defendant filed herein, for

the reason that the matters and things therein alleged and set forth do not constitute a defense to the plaintiff's cause of action.

UNITED STATES OF AMERICA,
By A. W. LANE,
Ass't. U. S. Attorney.

Endorsed: Filed April 23, 1913. R. C. Hoyt, clerk, by John Nicholson, deputy.

Amended answer.

First. Now comes the defendant and for amended answer to the petition of the plaintiff denies each and every allegation therein contained except such as are hereinafter expressly admitted or otherwise explained.

Second. Defendant admits the allegations contained in the first and fifth paragraphs of the petition.

Third. This defendant for further answer to the plaintiff's petition alleges that the United States is without statutory authority, either as trustee or as guardian for the Omaha Tribe of Indians or of Rose Wolf Setter, to institute or prosecute the cause of action set forth in the plaintiff's petition against this defendant, and further avers that the United States is without authority, except as may be provided by the statute of the United States or a treaty, to act as trustee or a guardian for the Omaha Tribe of Indians or for Rose Wolf Setter, and further avers that there is no statute of the United States or treaty existing between the United States and the Omaha Tribe of Indians authorizing the United States to act either as trustee or as guardian in relation to the property in controversy in this suit, or as to the rents or revenues arising out of the use or occupation of the property in controversy in this suit.

6 Fourth. Defendant for further answer avers that the United States District Court for the District of Nebraska is without jurisdiction over the subject matter of the action set forth in plaintiff's petition, for that said action is not one wherein the United States is suing in its sovereign capacity to recover money or property in its own behalf; and further avers as appears by the face of plaintiff's petition that the amount in controversy is insufficient to give said court jurisdiction in a case wherein the United States is assuming to act only as trustee or guardian for others and with reference to property rights in behalf of others, to wit, the Omaha Tribe of Indians and Rose Wolf Setter.

Fifth. This defendant for further answer to the plaintiff's petition admits that the present Omaha Indian Reservation and the lands comprising said reservation were established under treaty with the United States in or about the year 1854, but in this connection the defendant further avers that under and by virtue of a subsequent treaty between the United States and the Omaha Tribe of Indians, proclaimed February 15, 1866, the Secretary of the Interior was authorized and empowered to assign in severalty tracts and parcels of

the Omaha tribal Indian lands to the members thereof; and that the Secretary of the Interior did, pursuant to authority so conferred upon him, allot and assign, about the year 1870, the lands in controversy in this suit to one Clarissa Chase, who then was and until her death continued to be and remain a member of the Omaha Tribe of Indians, and which said Clarissa Chase was the mother of this answering defendant. That in accordance with the provisions of said treaty a certificate for said land was issued by the proper authorities of the United States in that behalf unto the said Clarissa Chase, which among other things recited:

"That the said land was so assigned for the exclusive use and benefit of the said Clarissa Chase, her heirs and descendants, and that said tract shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture until otherwise provided for by Congress."

That the said Clarissa Chase did not alienate, lease, or otherwise dispose of said land in any manner or form, but to the contrary continued to be and remain the owner thereof during the period of her natural life.

7 This defendant further avers that after the issuance of said certificate of allotment of said lands to said Clarissa Chase that she took possession of said land in the year 1871, and continued in the open, notorious, exclusive, and adverse possession of said land up to and until the time of her death, about November 1, 1875, and that upon her death the title to and the right to the possession of said land became vested in the defendant, who then was and who ever since has continued to be the sole and only surviving child and heir at law of the said Clarissa Chase, deceased, and that this defendant, as such such surviving child and heir at law of Clarissa Chase, did immediately upon the death of said Clarissa Chase, enter into possession of the said lands and ever since has been in the continuous, open, notorious, exclusive, and adverse possession of said land, claiming to be the owner thereof.

That by reason of the premises aforesaid, the United States did not have a right or authority to allot or assign the said lands to one Reuben Wolf and was without right or authority to issue its trust patent to the said Reuben Wolf under date of March 7, 1902, or at any other time, and that the said pretended allotment, assignment, and trust patent to the said Reuben Wolf, if any there was so made, executed, or issued, was without right or authority as against this defendant and did not operate to divest this defendant of his right or title to the lands in controversy as a descendant and heir at law of his mother, Clarissa Chase.

Sixth. This defendant for further answer avers that by reason of his continuous, open, notorious, exclusive, and adverse possession of his mother, Clarissa Chase, from 1871 down to November 1, 1875,

under a claim or right and color of title arising out of the issuance of said certificate of allotment to said Clarissa Chase in the year 1870, by reason of lapse of time operated to give to and vest in this defendant a title to the said lands adverse to any right, claim, or title of the Omaha Tribe of Indians thereto in their tribal capacity and adverse to any right, claim, or title of Rose Wolf Setter as heir or next of kin of Reuben Wolf, arising out of or under any pretended allotment or trust deed to him, and that by reason of the premises any cause of action for or in behalf of the Omaha Tribe of Indians or of Rose Wolf Setter to have and recover said lands from this defendant, or to have and recover the rents and revenues thereof, are barred by laches and by the statute of limitations in that behalf.

Seventh. This defendant for further answer avers that after s the said allotment to Clarissa Chase in severalty in 1870, the United States held whatever legal title in the said land, if any it had, in trust for her, the said Clarissa Chase, and for this defendant as her heir and descendant, and that thereafter the United States did not and does not hold the legal title thereto in trust for or in behalf of the Omaha Tribe of Indians, and did not and does not hold the legal title thereto in trust for or in behalf of the said Reuben Wolf or of Rose Wolf Setter. This defendant denies that after the said allotment to Clarissa Chase in 1870 that the lands in controversy remained the common property of the Omaha Indian Tribe, and denies that the Omaha Indian Tribe was thereafter entitled to the exclusive use of said lands or to the value of the use thereof, and this defendant denies that the reasonable rental value of said lands were and are as set forth in the plaintiff's petition, and denies that the plaintiff is entitled to have, either at law or in equity, the relief sought in said petition, and denies each and singular of the averments of ts set forth in said petition not hereinbefore denied or severally pleaded unto.

[Eighth.] The defendant, further answering the petition of the plaintiff avers the facts to be that Rose Wolf Setter, plaintiff, as heir and widow of Reuben Wolf, deceased, has no right, title, or interest in and to the real estate in question, for that the allotment and the issuance of the trust patent to said Reuben Wolf, deceased, was made in violation of the act of 1882 aforesaid and in particular the 6th section thereof, in that the said Reuben Wolf was not a living person at and during the time of the supposed allotment of said land was made, to wit, during the year 1889; and that the said Reuben Wolf died on the 10th day of August, 1899, before the said allotment was completed and before the approval of said allotment by the Secretary of the Interior, as provided by the 6th section of said act of 1882; and that the supposed trust patent issued for said land to said Reuben Wolf, deceased, was issued to him after his death, to wit, on the 7th day of March, 1902, and in violation of said statute of 1882.

Wherefore defendant prays that he may go hence without [delay] and recover his costs.

HIRAM CHASE,
By HIRAM CHASE, *for himself.*

STATE OF NEBRASKA,
County of Douglas, ss:

I. Hiram Chase, being first duly sworn, depose and say that I am the defendant in the above-entitled cause; that I
9 have read the foregoing answer, and that the facts therein stated are true as I verily believe.

HIRAM CHASE.

Subscribed in my presence and sworn to before me this 5th day of November, 1913.

[SEAL.] IDA M. WALTERS,
Notary Public.

Endorsed: Filed Nov. 5, 1913, R. C. Hoyt, clerk.

Order, Nov. 22, 1913, demurrer to answer to stand as demurrer to amended answer, and sustaining same, etc.

Before Judge Morris. September term, 1913.

It is ordered by the court that the demurrer to the answer herein is to stand as demurrer to the amended answer and the same was argued and sustained, the formal order to be prepared and entered later. To which ruling of the court the defendant excepts.

And it is ordered that leave be, and the same is hereby, given to file amended answer in ten (10) days.

Judgment.

September term, 1913.

THE UNITED STATES OF AMERICA, AS TRUSTEE AND guardian for the Omaha Tribe of Indians and of Rose Wolf Setter, plaintiff,
vs.
HIRAM CHASE, DEFENDANT.

And now on this 22nd day of November, 1913, this cause came on for hearing on the demurrer to the amended answer heretofore filed by the defendant and was submitted to the court by the parties and taken under advisement.

And now on this 22nd day of November, 1913, on consideration whereof, and the court being fully advised in the premises does sustain said demurrer, and the defendant being unable to further amend

his amended answer and electing to stand upon his said amended answer, the court finds the issues in favor of the plaintiff and assesses his recovery at the sum of $480.00, and it is therefore

Ordered by the court that judgment be entered in favor of
10 the plaintiff and against the defendant for said sum of $480.00 and costs to be taxed by the clerk, to all of which rulings and findings upon said demurrer the defendant duly excepts, and exceptions allowed.

By the court:

PAGE MORRIS, *Judge.*

Endorsed: Received and filed Jan. 14, 1914, R. C. Hoyt, clerk.

Assignment of errors.

Comes the above-named defendant, Hiram Chase, and files the following assignment of errors:

First. That the court erred in sustaining the demurrer to the amended answer of defendant.

Second. That the court erred in entering judgment against defendant on the sustaining of said demurer.

Third. The court erred in ruling that defendant's amended answer did not state a cause or causes of defense, and sustaining the demurrer of complainants to the said amended answer of defendant, and entering judgment against the defendant.

Fourth. The court erred in not holding on said demurrer to defendant's amended answer that by force and effect of article 4 of the treaty of 1865 and the certificate issued thereunder for the land in dispute to one Clarissa Chase and her heirs passed all right, title, and interest in and to the land in dispute (and out of which rent is claimed by plaintiffs) out of the United States and the said Omaha Tribe of Indians, and that said Clarissa Chase and her heirs by force and effect of said treaty and the certificate were owners of all right, title, and interest in and to the land out of which rent is claimed by plaintiffs in this action, except that said Clarissa Chase and heirs were restrained from conveying or deeding the fee title of said lands, or leasing, or otherwise disposing of said land except to the United States or to other members of the tribe as provided in said treaty, and that upon the death of said Clarissa Chase all right, title, and interest in and to said land out of which rent is claimed by plaintiffs passed to Hiram Chase, the defendant, as sole surviving child, son, and heir of said Clarissa Chase, deceased; and that said Hiram Chase was at the commencement of the action and now is owner of said land out of which rent is claimed by plaintiffs, who have no right, title, or interest in said real estate, except that
11 the said United States in its own right and not as trustee, reserves the right to purchase said land for its full value from either Clarissa or her heirs.

Fifth. The court erred in not holding on said demurrer to the amended answer of the defendant that after the grant of the land (out of which rent is claimed by plaintiffs) under said treaty of 1865 to the said Clarissa Chase and her heirs, that the United States and the Omaha Tribe of Indians subsequent to said grant had no right, power, or authority by deed, act of legislation or otherwise to divest and destroy the grant so made of said land to said Clarissa Chase and her heirs, and the attempted allotment and issuance of a patent of said land to one Reuben Wolf, a deceased Omaha Indian, under the provisions of the act of Congress of 1882 is utterly null and void, and that said allotment to said Reuben Wolf in no wise affects the said grant to Clarissa Chase and her heirs of said land under the treaty of 1865, and that said allotment to Reuben Wolf conferred no right, title, or interest in and to said land to plaintiff, Rose Wolf Setter, as the widow and heir of said Reuben Wolf, deceased.

Sixth. The court erred in holding on said demurrer to the amended answer of the defendant that the United States is a trustee of said land for the Omaha Tribe and of Rose Wolf Setter, plaintiffs.

Seventh. The court erred in holding on said demurrer to the amended answer of the defendant that the Omaha Tribe of Indians and Rose Wolf Setter had interests in said land out of which rent is claimed.

Eighth. The court erred in holding on said demurrer to the amended answer of defendant that defendant had no right, title, or interest in and to the real estate out of which rent is claimed.

HIRAM CHASE,
Solicitor and Attorney for the Defendant.

Endorsed: Filed Feb. 19, 1914. R. C. Hoyt, clerk.

Petition for writ of error.

To the honorable judges of the District Court aforesaid:

Now comes the above-named Hiram Chase and respectfully shows to the court that on the 22nd day of November, 1914, the court sustained the demurrer to the amended answer in the above cause against your petitioner and in favor of the above-named
12 United States of America as trustee and guardian of the Ohama Tribe of Indians and of Rose Wolf Setter, a member of said tribe, and that upon the order sustaining said demurrer a final judgment was entered on the 14th day of January, A. D. 1914, against your petitioner, Hiram Chase.

Your petitioner, feeling himself aggrieved by said ruling on said demurrer and judgment therein as aforesaid, herewith petitions the court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Eighth Circuit under the laws of the United States in such case made and provided.

Wherefore premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid sitting at St. Louis, Missouri, U. S. A., in said circuit for the correction of the errors complained of and herewith assigned be allowed, and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

HIRAM CHASE,
Attorney for Petitioner in Error.

Endorsed: Filed Feb. 19, 1914. R. C. Hoyt, clerk.

Order allowing writ of error.

This cause came on to be heard upon defendant's petition for allowance of a writ of error. It is now ordered that the writ of error be allowed as prayed for, and that the supersedeas bond be, and the same is hereby, fixed in the sum of $1,000.00.

PAGE MORRIS, *Judge.*

Endorsed: Filed Feb. 19, 1914. R. C. Hoyt, clerk.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judge of the District Court of the United States for the District of Nebraska, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court,
13 before you, at the September term, 1913, thereof, between United States of America as trustee and guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe, and Hiram Chase, a manifest error has happened, to the great damage of the said Hiram Chase, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit on or before the 20th day of April, A. D. 1914, to the end that the record and proceedings aforesaid be inspected,

the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 19th day of February, 1914.

Issued at my office in the city of Omaha, Nebraska, with the seal of the District Court of the United States for the District of Nebraska, dated as aforesaid.

[SEAL.] R. C. HOYT,
Clerk U. S. District Court, District of Nebraska.

U. S. Dist. Court, Dist. of Nebraska, Omaha Division.

Allowed by Page Morris, Judge.

Return to writ.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

In obedience to the command of the within writ I herewith transmit to the United States Circuit Court of Appeals for the
14 Eighth Circuit of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said district court, at my office in the city of Omaha, this 3rd day of April, A. D. 1914.

[SEAL.] R. C. HOYT,
Clerk of said Court.

U. S. Dist. Court, Dist. of Nebraska, Omaha Division.

Endorsed: Filed in the District Court on Feb. 19, 1914.

Citation.

THE UNITED STATES OF AMERICA.

To United States of America, as trustee and guardian of the the *Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe, greeting:*

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Nebraska, wherein Hiram Chase is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable the judges of the District Court of the United States for the District of Nebraska this 19th day of February, A. D. 1914.

PAGE MORRIS,
United States District Judge, District of Nebraska.

Service of the within citation is hereby accepted this 20 day of February, A. D. 1914.

F. S. HOWELL,
Attorney for United States of America as Trustee and Guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe.

Endorsed: Filed in the District Court on Feb. 19, 1914.

15 *Supersedeas bond.*

Know all men by these presents, that we, Hiram Chase, as prinpal, and Cynthia Chase, as surety, are held and firmly bound unto the United States of America as trustee and guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, in the full and just sum of one thousand dollars ($1,000.00) to be paid to the said the United States of America as trustee and guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, their heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 5th day of February, 1914.

Whereas lately at the September, 1913, term, A. D., of the District Court of the United States for the District of Nebraska, in a suit depending in said court between the United States of America as trustee and guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe, plaintiffs, and Hiram Chase as defendant, judgment was rendered against the said Hiram Chase, and the said Hiram Chase has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America as trustee and guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such that if the said Hiram Chase shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

HIRAM CHASE.
CYNTHIA CHASE.

Sealed and delivered in presence of Pete Schleffenbach.
Approved by Page Morris, judge.
The foregoing bond is endorsed as follows:

STATE OF NEBRASKA,
Thurston County, ss:

Cynthia Chase, being first duly sworn, deposes and says that she is a resident of said county; that she has property
16 in said county, in the State of Nebraska, subject to execution over and above all exemptions of the value of $1,000 and upwards.

CYNTHIA CHASE.

Subscribed in my presence and sworn to before me this 5th day of February, 1914.

[SEAL.] HIRAM CHASE,
Notary Public.

Endorsed: Filed Feb. 19, 1914. R. C. Hoyt, clerk.

Praecipe for transcript.

To the clerk of said court:

Please prepare transcript for the Circuit Court of Appeals in the above-entitled action, same to consist of the following:

1. Petition filed May 7, 1908.
2. Demurrer filed April 23, 1913.
3. Amended answer filed Nov. 5, 1913.
4. Order sustaining demurrer, etc., entered Nov. 22, 1913.
5. Judgment entered Jan. 14, 1914.
6. Assignment of errors, petition for writ of error, order allowing writ of error, writ of error, bond, citation.

HIRAM CHASE,
Attorney for Defendant.

Endorsed: Filed March 6, 1914. R. C. Hoyt, clerk.

Clerk's certificate to transcript.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, R. C. Hoyt, clerk of the District Court of the United States within and for the District of Nebraska, hereby certify that pursuant to the foregoing writ of error and in obedience thereto, and in compliance with the praecipe, a copy of which is found on page 26 hereof, the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said court, as mentioned in said praecipe, and as indicated in the foregoing index, in the case of the United States of America, as trustee and guardian of the Omaha Tribe of
17 Indians and of Rose Wolf Setter, a member of said tribe, plaintiff, vs. Hiram Chase, defendant, case number "95," docket "Y." That copies of the writ of error and citation, duly

certified, have been lodged and remain in my said office as such clerk.

Witness my hand and the seal of said court at Omaha, in said district, this 3rd day of April, A. D. 1914.

[SEAL.] R. C. HOYT,
Clerk.

U. S. Dist. Court, District of Nebraska, Omaha division.
Filed Apr. 15, 1914, John D. Jordan, clerk.

18 And thereafter the following proceedings were had in said cause in the U. S. Circuit Court of Apeals, viz:

Appearance of Mr. Hiram Chase, as counsel for plaintiff in error.

United States Circuit Court of Appeals, Eighth Circuit.

HIRAM CHASE, PLAINTIFF IN ERROR, *vs.* UNITED STATES OF AMERICA AS TRUSTEE AND GUARDIAN of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe.	No. 4200.

The clerk will enter my appearance as counsel for the plaintiff in error.

HIRAM CHASE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 31, 1914.

Appearance of counsel for defendant in error.

The clerk will enter my appearance as counsel for the defendant in error.

(Omaha) F. S. HOWELL, *U. S. Atty.*
(Lincoln) A. W. LANE, *Asst. U. S. Atty.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 25, 1914.

Appearance of Mr. Thomas L. Sloan as counsel for plaintiff in error.

The clerk will enter my appearance as counsel for the plaintiff in error.

THOMAS L. SLOAN.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 17, 1914.

19 *Order of submission.*

December term, 1914.

WEDNESDAY, *December 16, 1914.*

This cause having been called for hearing in its regular order, argument was commenced by Mr. Hiram Chase, pro se, for plaintiff in error, continued by Mr. A. W. Lane for defendant in error, and concluded by Mr. Thomas L. Sloan for plaintiff in error.

Thereupon, this cause was submitted to the court on the transcript of record from said district court and the briefs of counsel filed herein.

20 *Opinion.*

United States Circuit Court of Appeals, Eighth Circuit.

No. 4200—December term, A. D. 1914.

HIRAM CHASE, PLAINTIFF IN ERROR, *vs.* UNITED STATES OF AMERICA, AS TRUSTEE and guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe, defendant in error.	In error to the District Court of the United States for the District of Nebraska.

Mr. Hiram Chase, pro se, and Mr. Thomas L. Sloan (Mr. William Ross King was with them on the brief) for plaintiff in error.

Mr. A. W. Lane, assistant United States attorney (Mr. F. S. Howell, United States attorney, was with him on the brief) for defendant in error.

Before SANBORN and SMITH, circuit judges, and TRIEBER, district judge.

Syllabus.

1. Indian titles—Treaty with Omahas, 1865.

The treaty with the Omaha Tribe of Indians of March 6, 1865, granted to the assignees of land in severalty thereunder an inheritable title in fee simple to their respective tracts, subject to a restriction on alienation to others than the United States and other members of the tribe.

21 2. United States as formal plaintiff—Rights of.

When the United States brings an action in which it has no pecuniary interest, in behalf of or for the benefit of a private party, it stands in the shoes of that party and has no higher or better right.

3. Indians—Protection of Constitution—Act of Congress—Due process.

Indians, as well as other residents and citizens of the United States, are protected by the fifth amendment to the Constitution

against deprivation of property, life, or liberty without due process of law.

No act of Congress or legislative fiat constitutes such due process of law as may impair or destroy a vested right in or title to property.

4. Treaties—Construction judicial, not legislative, function.

The construction of treaties and the determination of the character and extent of the rights and titles granted thereunder is a judicial and not a legislative function.

The constitution grants the power and imposes the duty, which may not be renounced, upon the courts to form and enforce their independent judgments upon these questions, although they may differ from the opinions of the Congress or its members.

5. Indian treaties—How interpreted.

Because when treaties were made with them the Indians were unfamiliar with the language in which they were written and with the exact meaning of many of the terms used in them, they must be construed liberally, doubtful expressions must be resolved in favor of the Indians, and the treaties must be interpreted "not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians."

SANBORN, Circuit Judge, delivered the opinion of the court.

The question in this case is whether Hiram Chase, the sole heir of the grantee of a tract of forty acres of land under section 4 of
22 the treaty of March 6, 1865, with the Omaha Tribe of Indians, 14 Stat., 667, 668, or Rose Wolf Setter, the sole heir of the grantee of the same land under section 5 of the act for the sale of a part of the reservation of the Omaha Tribe of Indians of August 7, 1882, 22 Stat., chap 434, pages 341, 342, has the title and the right to the possession of the tract. The facts which condition the answer to this question were set forth and admitted in the pleadings in this action, in which the United States as trustee for Rose Wolf Setter, and for the Omaha Tribe, brought an action and recovered a judgment against Chase for the value, use, and occupation of the land for many years. Those facts are these: By the treaty of March 6, 1865, the United States agreed to pay the Omaha Tribe $57,000.00, the tribe agreed to sell and convey a part of their reservation to the United States, the United States and the tribe further agreed that the remainder of the reservation of the Omaha Tribe should be set apart for the purpose of abolishing the tenure in common by which the Omaha Indians held their lands and of assigning the same to them in severalty, "and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person eighteen years of age and upwards without family not exceeding forty acres of land. * * * Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him shall be final and conclusive. Certificates shall be

issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned, respectively, and that they are for the exclusive use and benefit of themselves, their heirs and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe under such rules and regulations as may be prescribed by the Secretary of the Interior; and they shall be exempt from taxation, levy, or forfeiture until otherwise provided for by Congress." Pursuant to this treaty the land in controversy, which was a part of the land reserved thereunder to be assigned in severalty, was duly assigned about the year 1870 by the Secretary of the Interior to Clarissa Chase, a member of the Omaha Tribe and the mother of the defendant. A certificate was issued to her about the year 1870 by the Commissioner of Indian Affairs "that the said land was
23 so assigned for the exclusive use and benefit of the said Clarissa Chase, her heirs and descendants, and that said tract shall not be alienated in fee, leased, or otherwise disposed of except to the United States or the other members of the tribe under such rules and regulations as may be prescribed by the Secretary of the Interior; and they shall be exempt from taxation, levy, sale, or forfeiture until otherwise provided for by Congress," and thereafter, in the year 1871, Clarissa Chase took possession of the land and continued in the open, notorious, exclusive, and adverse possession thereof until she died, about November 1, 1875. Immediately after her death Hiram Chase, who was her only surviving child and her sole heir at law, entered into possession of the land as such and has ever since continued in the open, notorious, exclusive, and adverse possession thereof, claiming to be its owner.

The claim of the real plaintiff below, Rose Wolf Setter, arises in this way. By the terms of sections 4, 5, and 6 of the act to provide for the sale of a part of the reservation of the Omaha Tribe, etc., approved August 7, 1882, 22 Stat., chap. 434, secs. 5 and 6, page 342, Congress provided: (1) "That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act." (2) Authorized the Secretary of the Interior to allot in severalty to the Indians of the tribe that portion of its reservation which includes the tracts in controversy in this action, and declared that the "allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas concluded March 6, 1865, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned have been issued by the Commissioner of Indian Affairs as in said article provided;" that certain Indians who have made valuable improvements on specified tracts of land should have, respectively, preference rights to select them, and that after the allotments were made under the act of August 7, 1882, the certificates issued by the Commissioner of Indian Affairs under the treaty of March 6, 1865, should be null and void and the Secretary of the In-

terior should issue patents to the allottees under the act of 1882 to the effect that the United States would hold the land thus allotted in trust for the allottees and their heirs, respectively, for
24 twenty-five years, and would then convey the same to them.

In 1899 the land in controversy was allotted by the Secretary of the Interior to Reuben Wolf, a member of the Omaha Tribe entitled to an allotment, and on March 7, 1902, a trust patent for the land was issued to him under the act of August 7, 1882. On August 10, 1899, Reuben Wolf died, and Rose Wolf Setter, the real plaintiff, is his widow and sole heir.

Under this state of facts the question is whether the treaty of 1865 granted to Clarissa Chase a substantial title to or right in the forty-acre tract in question, or a mere revocable license of possession and use thereof. If the latter, the act of 1882 was undoubtedly a sufficient revocation of the license, and the title of Rose Wolf Setter is the superior one. If the former, the act of 1887 is ineffective to impair or destroy the right and title of Chase, and his title and right of possession must prevail over the claim of Rose Wolf Setter, the Omaha Tribe, and the United States, which has no pecuniary interest in the action or the property involved, and no higher or better right than Rose Wolf Setter, whom it represents. United States v. Beebe, 127 U. S., 338, 346; United States v. Winona & St. Peter R. R. Co., 67 Fed., 969, 972, 15 C. C. A., 117, 120.

If by the treaty of 1865 a substantial right in or title to the land in question was granted to or vested in Clarissa Chase and her heirs, the subsequent act of Congress of 1882 was ineffective to impair or destroy that right or title because: First, Indians as well as other residents and citizens of the United States are protected by the fifth amendment to the Constitution against deprivation of property, life, or liberty, without due process of law. No act of Congress or legislative fiat constitutes due process of law whereby a vested right in or title to property may be either seriously impaired or destroyed. Choate v. Trapp, 224 U. S., 665, 670, 677; Jones v. Meehan, 175 U. S., 1; In re Heff, 197 U. S., 488, 504; Cherokee Nation v. Hitchcock, 187 U. S., 294, 307; Jackson v. Goodell, 20 John. (N. Y.) 188; Lowry v. Weaver, 4 McLean, 82; Whirlwind v. Von der Ahe, 67 Mo. App., 628; Taylor v. Drew, 21 Ark., 485, 487. Second, except in political cases, and this case is not a political case, Congress has no power under the Constitution of the United States to affect rights or titles granted by a treaty, or to determine what rights were
25 granted thereby. Nor may the character of the right or interest granted to Clarissa Chase by the treaty of 1865 be determined by the opinion of Congress that that right or interest was revocable and negligible, though it be evidenced by its declaration in the act of 1882 that after the new allotments were made under that act the certificates of right and title issued by the Commissioner of Indian Affairs under the treaty of 1865 should be null and void. The construction of treaties and the determination of the character and extent of the rights and titles granted under them is a judicial,

and not a legislative, function, and by the Constitution the power is granted and the duty, which may not be renounced, is imposed upon the courts to form and enforce their independent judgments upon these questions, although these judgments may differ from the opinions of the Congress or its Members. Jones v. Meehan, 175 U. S., 1-32; Wilson v. Wall., 6 Wall., 83, 89; Reichart v. Felps, 6 Wall., 160, 162; Smith v. Stevens, 10 Wall., 321, 327; Holden v. Joy, 17 Wall., 211, 247. Third, section four of the act of 1882 expressly provides "That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act."

We turn, therefore, to the treaty of 1865 to ascertain what right or title was granted to Clarissa Chase and we lay out of consideration here the terms of the certificate issued under that treaty and of the certificate and patent issued under the act of 1882, because their validity and effect are measured respectively by the legal effect of the treaty and the act under which they were respectively issued. A good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe without any act of Congress, or any patent or certificate from the executive department of the United States. Jones v. Meehan, 175 U. S., 1, 10; Johnson v. McIntosh, 8 Wheat., 543; Mitchel v. United States, 9 Pet., 711, 748; Doe v. Beardsley, 2 McLean, 417, 418; United States v. Brooks, 10 How., 442, 460; Doe v. Wilson, 23 How., 457, 463; Crews v. Burcham, 1 Black, 356; Holden v. Joy, 17 Wall., 211, 247; Best v. Polk, 18 Wall., 112, 116; New York Indians v. United States, 170 U. S., 1; Francis v. Francis, 203 U. S., 233, 237, 239, 240. The question in every case is whether or not the terms of the treaty make a present grant of a substantial right to or
26 title in the property. And because when treaties were made with them the Indians were unfamiliar with the language in which they were written and with the exact meaning of many of the terms used in them, they must be construed liberally, doubtful expressions must be resolved in favor of the Indians and the treaties must be interpreted "not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians." Jones v. Meehan, 175 U. S., 1, 11; The Kansas Indians, 5 Wall., 737, 760; Choate v. Trapp, 224 U. S., 665, 675.

Counsel for the United States argue that there was no consideration for the grant of any substantial right to Clarissa Chase by the treaty of 1865, and that it is therefore not probable that it was the intention of the parties to make any such grant. But before the treaty was made Clarissa Chase had the right in common with all the members of her tribe to the joint use and occupation of all the lands of the tribe. By the treaty she surrendered to the other members of the tribe her right to the common use and occupation of the lands assigned to them in severalty under the treaty as well as her beneficial right in the lands sold. She did this in consideration of the grant to her in severalty of her tract and the receipt by her tribe of the amounts paid for the lands sold. The consideration was

ample to sustain a valid grant or contract. It is contended that the tribe had nothing but the right of possession and occupancy of the land, and therefore the assignment in severalty gave nothing but a right of possession and occupancy of the land assigned in severalty. But the United States had the title to the land and the power to convey it, and by the treaty the United States and the tribe, which together had the title and the right of possession and occupancy, assigned all their interest in the land here in question to the Indian designated by the Commission of Indian Affairs, in this case Charissa Chase, for the exclusive use and benefit of that Indian, her heirs and descendants, "not to be alienated in fee, except to the United States or other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior." An estate in fee simple is where one has an estate in lands or tene-
27 ments to him and his heirs forever, and such an estate is not inconsistent with a restriction on alienation. Libby v. Clark, 118 U. S., 250, 255. The grant of the treaty was therefore by those who held the title and right of possession of the land for the exclusive benefit of the assignee, her heirs and descendants; the treaty declared that when the assignment was approved by the Secretary of the Interior, as it was, it should be final and conclusive, and that the land should not be alienated in fee, except to the United States or the other members of the tribe. This was a grant, by those who had the title and right of possession, of title in fee, because it was a grant by them of the land to the assignee and her heirs forever, and because the restriction upon the alienation in fee, except to those specified, demonstrates the intention to grant the land in fee with the power to alienate to the United States and the other members of the tribe. The title granted was inheritable because it was to the assignee and her heirs. It was alienable to the United States and to other members of the tribe because the restriction upon alienation was specifically to others, and the conclusion is irresistible that the treaty of 1865 interpreted in the sense in which it must have been naturally understood by the Indians and by the white men who made it, was a grant to the Indian assignees designated by the Commissioner of Indian Affairs to receive lands in severalty thereunder of the title to their respective tracts in fee, subject only to a restriction upon alienation to others than the United States or the other members of the tribe. Such a title and the right of exclusive possession and use of the tract in controversy in this case was granted to Clarissa Chase by the treaty, and such a title her sole heir, Hiram Chase, has inherited and now holds.

This conclusion has not been reached without a careful consideration of the opinions of Judge Shiras in Sloan v. United States, 95 Fed., 193, 196, and Sloan v. United States, 118 Fed., 283. But in those cases the attention of the court does not appear to have been challenged to the rights of grantees holding their lands in severalty under the treaty of 1865, and so far as there are expressions in these opinions inconsistent with the conclusions that have been reached in

this case they fail to persuade. Let the judgment below be re-
28 versed and let the case be remanded to the District Court with instructions to render a judgment on the merits of the case in favor of Hiram Chase, the defendant below.

Filed April 23, 1915.

29 *Judgment.*

United States Circuit Court of Appeals, Eighth Circuit, December term, 1914.

MONDAY, APRIL 26, 1915.

HIRAM CHASE, PLAINTIFF IN ERROR,
vs.
UNITED STATES OF AMERICA, AS TRUSTEE AND guardian of the Omaha Tribe of Indians, and of Rose Wolf Setter, a member of said tribe. } No. 4200.

In error to the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, reversed without costs to either party in this court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a judgment on the merits in favor of Hiram Chase, the defendant below.

APRIL 26, 1915.

30 *Clerk's certificate.*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Hiram Chase is plaintiff in error and the United States of America as trustee and guardian of the Omaha Tribe of

Indians and of Rose Wolf Setter, a member of said tribe, is defendant in error, No. 4200, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twentieth day of July, A. D. 1915, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the District of Nebraska.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit at office in the city of St. Louis, Missouri, this thirty-first day of March, A. D. 1916.

[SEAL.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Official business. Doc. rev. stamp not required.

31 In the Supreme Court of the United States. October Term, 1916.

THE UNITED STATES OF AMERICA, AS TRUSTEE, ETC., petitioner, *vs.* HIRAM CHASE. } No. 447.

Stipulation as to return.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit to the writ of certiorari granted therein.

JNO. W. DAVIS,
Solicitor General.
HIRAM CHASE, *pro se.*
HIRAM CHASE,
Counsel for Respondent.

JUNE 20, 1916.

(Endorsed:) No. 4200. Hiram Chase, plaintiff in error, vs. United States of America, as trustee, etc. Stipulation as to return to writ of certiorari from Supreme Court, U. S., filed July 1, 1916. John D. Jordan, clerk.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Hiram Chase is plaintiff in error, and the United States of

America as trustee and guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe, is defendant in error, No. 4200, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Nebraska, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
33 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of June, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER.
Clerk of the Supreme Court of the United States.

34 *Return to writ.*

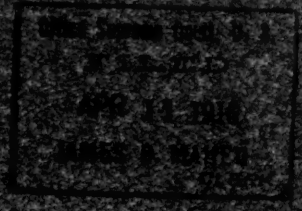
UNITED STATES OF AMERICA, *Eighth Circuit, ss.*

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Hiram Chase, plaintiff in error, vs. United States of America as trustee and guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe, No. 4200, is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this first day of July, A. D. 1916.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) File No. 25,237. Supreme Court of the United States, No. 447, October term, 1916. The United States of America, as trustee, etc., vs. Hiram Chase. Writ of certiorari. Filed July 1, 1916. John D. Jordan, clerk.



No. [redacted] 146

In the Supreme Court of the United States

October Term, 1915

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN OF THE OSAGE TRIBE OF INDIANS, AND OF ROSE WOLF HUNTER, A MINOR OF SAID TRIBE, PETITIONERS,

vs.

[redacted]

PETITION FOR A WRIT OF CERTIORARI TO THE [redacted] COURT OF APPEALS OF THE [redacted] CIRCUIT

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN OF THE OMAHA TRIBE OF INDIANS, AND OF ROSE WOLF SETTER, A MEMBER OF SAID TRIBE, PETITIONER,
v.
HIRAM CHASE.
} No. .

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT.

To the Supreme Court of the United States:

The Solicitor General, on behalf of the United States, prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit in the above-entitled cause.

QUESTIONS PRESENTED.

The case presents the question whether the assignment of lands in the Omaha Indian Reservation, made under the treaty of March 6, 1865, 14 Stat. 667, vested such titles in the individual Indian assignees that the same lands could not afterwards be

allotted under the act of August 7, 1882, 22 Stat. 341, c. 434. It presents also the secondary question of whether, in view of the importance of a correct determination of the rights existing under the treaty and the act of Congress, the unusual course of the Circuit Court of Appeals in directing the entry of a judgment on the merits ought not to be reversed so as to allow the plaintiff, by pleading over, to present its case as fully and favorably as possible.

THE FACTS.

The action was brought by the United States on behalf of the Omaha Tribe of Indians and Rose Wolf Setter against Hiram Chase, also an Indian, for rent of the land in question. The complaint alleges, *inter alia*, that the land was allotted to the ancestor of Rose Wolf Setter under the act of 1882, section 5 of which, so far as applicable, is as follows (22 Stat. 342):

> That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company * * * in severalty to the Indians of said tribe in quantity as follows * * * which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five,

> and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section * * * after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

Chase's amended answer alleges that the land was assigned to his ancestor in 1870, under the treaty of 1865, article 4 of which is as follows (14 Stat. 668):

> The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that

> the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there *shall be assigned* to each head of a family not exceeding one hundred and sixty acres * * *. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased or otherwise disposed of except to the United States or other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress. [Italics ours.]

The United States successfully demurred to the amended answer, and Chase, being unable to amend further, stood upon his answer and appealed. The appellate court concluded that the demurrer had been erroneously sustained, and thus treating the allegations of the answer, among which were statements that might have been controverted, as proved, and the case as fully presented, reversed the trial court and instructed it "to render judgment on the

merits of the case in favor of Hiram Chase, the defendant below." The appellate court thereby deprived the plaintiff of the opportunity to disprove the allegations of the answer or to oppose them with new matter in a reply.

The amount directly in issue is $480, a sum insufficient to allow the case to be brought to this court by writ of error.

REASONS FOR THE ALLOWANCE OF THE WRIT.

The case involves an interpretation of the treaty of 1865 and a determination of the effect of the act of 1882 and of the allotting of reservation lands, made in accordance therewith upon the "assignments" of the same lands theretofore made under the treaty.

The files of the Interior Department indicate that the Indians were dissatisfied with and felt insecure in their titles under the treaty as the Indian Office interpreted it and as the Indians themselves understood it. The act of 1882, providing for allotments, was passed to remedy that situation, and the reservation lands theretofore assigned under the treaty were allotted under the statute. The opinion of the Circuit Court of Appeals holds that an assignment under the treaty is superior to an allotment under the statute. The Assistant Commissioner of Indian Affairs, in a letter to the Secretary of the Interior, dated September 30, 1915, states that—

> If the decision of the Circuit Court of Appeals is affirmed, the title to some 43,000 acres of land on the Omaha Reservation,

> worth approximately $3,500,000 and held by many people, will be seriously affected, and a precedent will thus be established which is far-reaching and disastrous in its consequences.

The case is therefore of general and public importance.

BRIEF IN SUPPORT OF THE PETITION.

I.

The decision of the Circuit Court of Appeals reverses the Interior Department's interpretation of the treaty. This interpretation had stood and been acted upon for thirty years and was in accordance with the Indians' understanding of the words used and within their fair intent.

That the Indians themselves and the Interior Department did not understand that the treaty of 1865 gave the assignees of lands thereunder such titles as would prevent Congress from providing for the allotment of the same lands thereafter, as it undoubtedly sought to do by the act of 1882, is shown by the history of that legislation and the action taken under it. A memorial of members of the tribe addressed to the Senate (H. Rept. No. 1530, 47th Cong., 1st sess.), omitting signatures and formal parts, is as follows:

> We, the undersigned, members of the Omaha tribe of Indians, have taken out certificates of allotment of land, or entered upon claims within the limits of the Omaha reserve. We have worked upon our respective lands from three

to ten years; each farm has from five to fifty acres under cultivation; many of us have built houses on these lands, and all have endeavored to make permanent homes for ourselves and our children.

We therefore petition your honorable body to grant to each one a clear and full title to the land on which he has worked.

We earnestly pray that this petition may receive your favorable consideration, for we now labor with discouragement of heart, knowing that our farms are not our own, and that any day we may be forced to leave the lands on which we have worked. We desire to live and work on these farms where we have made homes, that our children may advance in the life we have adopted. To this end, and that we may go forward with hope and confidence in a better future for our tribe, we ask of you titles to our lands.

The Interior Department's position is indicated by the fact that the allotments were made, and by that department's present estimate that the decision of the Circuit Court of Appeals to the contrary unsettles titles to some 43,000 acres of land.

Further, in 1889 an appeal to the Secretary of the Interior was taken from the action of the Indian Office in refusing to entertain two claims of Indians based upon assignments under the treaty. The Acting Secretary, by a letter to the Commissioner of Indian Affairs, dated June 15, 1900, held that, since the lands had been allotted to another under the act

of 1882, the appeal must be dismissed, saying, *inter alia:*

> The act of 1882 provided that assignments thereunder should be in lieu of the assignments made under the treaty of 1865, and the Omahas having duly accepted the provisions thereof, assignees under the treaty are without recourse, except as provided in the act.

The interpretation thus made has stood ever since, and, it is understood, has been generally acquiesced in by the Indians and has never been challenged in judicial proceedings until in the case at bar. It is, we submit, at least an interpretation to which the treaty is fairly susceptible and which should not now be overthrown.

This court has always treated the construction placed upon an act of Congress or an Indian treaty by the department responsible for its administration with great consideration. In *Schell's Executors* v. *Fauché,* 138 U. S. 562, 572, the court, speaking through Mr. Justice Brown, said:

> In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling.

II.

Even if the court below was right in its interpretation of the treaty, plaintiff should be allowed to plead over and to show that the defendant's acts have estopped him from claiming benefits under it.

It is important to the Interior Department, in exercising the executive functions of the United States as guardian of the Omaha Indians, not only to know whether its interpretation of the treaty of 1865 is right or wrong, but, if the latter, to know whether the Indians, by accepting as a tribe the act of 1882, and the individual Indians by accepting allotments and other benefits under that act, have not surrendered whatever rights they had under the treaty. In the case at bar, the unusual action of the appellate court in directing the entry of judgment on the merits takes away from the plaintiff, the United States, that opportunity, an opportunity that it wished and expected to avail itself of in case the trial court's decision sustaining its demurrer to the answer should be reversed. If the trial court itself had overruled the demurrer instead of sustaining it, that court undoubtedly would have allowed the plaintiff to reply to the answer. Why, then, should the plaintiff be in a worse position when the trial court decided in its favor? The discretion to refuse to allow a demurrant to plead over properly reposes in the trial court, which alone has the opportunity to determine with justness whether he can mend his case or has already set it forth as fully and as favorably as possible. The proper practice of a court of review when it overrules

a demurrer that the trial court has sustained is that adopted by this court in *County of Dallas* v. *Mackenzie*, 94 U. S. 660. The closing paragraph of the opinion in that case is:

> The judgment must be reversed, and the cause remanded to the Circuit Court with directions to enter judgment upon the demurrer for the defendant below, unless the plaintiff shall withdraw his demurrer and proceed to trial, within such time and upon such terms as the Circuit Court may direct; and it is so ordered.

In view of the foregoing, it is respectfully submitted that a writ of certiorari should issue as prayed.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1916.

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No. 954 447 146

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

UNITED STATES OF AMERICA AS TRUSTEE AND GUARDIAN OF THE OMAHA TRIBE OF INDIANS, AND OF ROSE WOLF SETTER, A MEMBER OF SAID TRIBE, PETITIONER,

v.

HIRAM CHASE, RESPONDENT.

OBJECTIONS TO ALLOWANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT.

OMAHA: REED PRINTING CO.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

UNITED STATES OF AMERICA AS TRUSTEE AND GUARDIAN OF THE OMAHA TRIBE OF INDIANS, AND OF ROSE WOLF SETTER, A MEMBER OF SAID TRIBE, PETITIONER,

v.

HIRAM CHASE, RESPONDENT.

OBJECTIONS TO ALLOWANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT.

Respondent objects to the issuance of a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, in the above entitled cause, upon the following grounds:

First—The decision of the Circuit Court of Appeals doubtfully affects the title to any considerable amount of land. The allotees under the Act of 1882, with the exception of the instance involved in the case at bar, have acquired title by prescription.

Second—The case does not involve a question affecting the future control of the Omaha Indians by the Interior Department. The Department has exhausted its power to correct mistakes made in reallotting under the Act of 1882, land formerly allotted under the Treaty of 1865.

Third—The decision of the Circuit Court of Appeals does not involve a misinterpretation of the Treaty of 1865, but rather a misconception, upon the part of Congress and of the Department, of the power to reallot these lands.

Fourth—The petitioner sugests the possibility of the Government mending its case by pleading matters, which are wholly questions of law. The effect of the Act of 1882 and the acceptance thereof by the tribe, together with the acceptance by the individual Indians of allotments thereunder, was in the case as presented to the Circuit Court of Appeals.

Fifth—No application by motion for rehearing, as provided by the rules of the court, was made in the court below. No objection was made to the form of the judgment, or to the form of the order directed by the decree.

BRIEF IN SUPPORT OF OBJECTIONS.

I.

THE TREATY OF 1865 GAVE THE INDIAN FEE TITLE. IT HAS NOT BEEN AND CANNOT BE CONSTRUED OTHERWISE. WHATEVER MISTAKES WERE MADE IN REALLOTTING UNDER THE ACT OF 1882 HAVE PASSED RECALL. THE CASE AT BAR IS AN ISOLATED INSTANCE WHERE AN ALLOTEE UNDER THE TREATY RETAINED POSSESSION DESPITE THE ATTEMPT OF THE GOVERNMENT TO REALLOT THE LAND.

Article 4 of the Treaty of 1865, 14 Stat. 667, provides, that certificates shall be issued for the tracts of land "assigned" in severalty to the individual Indians for "the exclusive use and benefit of themselves, their *heirs and descendants;* and said tracts shall not be *alienated in fee,* leased or otherwise disposed of, *except* to the United States or other members of the tribe." In the language of the opinion of the Circuit Court of Appeals in the case at bar:

"This was a grant by those who had title and right of possession, of *title in fee,* because it was a grant by them of the land to the assignee and her heirs forever, and because the restriction upon alienation in fee, except to those specified, demonstrates the intention to grant the land in fee, with the power to alienate to the United States and the other members of the tribe. The title granted was inheritable, because it was to the assignee and her heirs; it was alienable to the United States and the other members of the tribe, because the restriction upon alienation was specifically to others, and *the conclusion is irresistible* that the Treaty of 1865, interpreted in the sense in which it *must have been naturally understood* by the Indians and by the white men who made it, was a grant to the Indian assignees * * * of the *title* to their respective tracts *in fee.*" (Italics ours.)

In pursuance of the treaty, part of the lands were distributed and settled upon by the Indians, who gave every evidence of claiming the land as their own.

The letter to the Commissioner of Indian Affairs, quoted on page 8 of petitioner's brief, was written only a short time after the decision by this court in the case of *Jones v. Meehan,* 175 U. S. 1, which gave a like interpretation of similar language in a treaty. Moreover the letter referred to, does not indicate a misinterpretation of the treaty, but rather an expression of opinion that Congress had the power to reallot the land (whereas it clearly did not) and that the Indians, if any were prejudiced thereby, were therefore remediless. Moreover, what was said by this court in *Jones v. Meehan,* 175 U. S. 1, 22, is applicable to the communication referred to:

"The letters of the Commissioner of Indian Affairs referred to in the supplemental brief of the defendant expressing the views entertained in his office at sundry times as to the effect of a reservation in an Indian Treaty to particular Indians without words

> of present grant, or of inheritance, * * * fall far short of establishing such a uniform practical construction of the term by the Executive Departments as would warrant the court in overruling its own opinion as expressed in the cases above stated."

The Indians almost universally accepted the action of Congress in passing the Act of 1882, and of the Department, as binding upon them, and as having the effect of nullifying the previous allotments (though up to 1882 the first allotments were treated by the Indians as their own property). The respondent, however, according to the petition, came into possession of the land about 1885, and retained possession both before and after the reallotment of the land in controversy in 1899. The case at bar, therefore, presents an isolated instance, where the rights under the Treaty of 1865, determined by the Circuit Court of Appeals, have not been lost by adverse possession.

Again, whether the question be one of interpretation or of the power of Congress to reallot the lands, the power of the Interior Department, with respect thereto, has been exhausted, and the decision of this court would be of doubtful value as a guide to future action.

II.

THE PETITIONER SHOULD NOT BE GRANTED THE WRIT OF CERTIORARI FOR THE PURPOSE OF REARGUING AND LAYING GREATER EMPHASIS UPON THE QUESTION OF ESTOPPEL WHICH WAS IN THE CASE AS PRESENTED TO AND DECIDED BY THE LOWER COURT. NO OBJECTION WAS MADE TO THE ORDER REMANDING THE CASE FOR DISMISSAL.

It was open to the Government in arguing the case before the Circuit Court of Appeals to raise the question which the petitioner now suggests it should have been permitted to plead, in reply to the answer. The Court of Appeals undoubtedly took judicial notice of

the fact that the Act of 1882 has been carried out and accepted for the most part, both by the tribe and the individual Indians. This is not a matter of fact, but only suggests a question of law open to argument and consideration in the court below.

Moreover, the fact of possession alleged in the eighth paragraph of the *plaintiff's petition* would prevent the operation of an estoppel as against respondent by any action of the tribe. The assignment under the treaty was not a mere reservation of lands held by the tribe; the tribal right of possession was extinguished and right of possession passed to the individual Indian. *Jones v. Meehan,* 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; *Francis v. Francis,* 203 U. S. 233, 27 Sup. Ct. 129, 51 L. Ed. 165. Thereafter any action of the tribe would not be binding on the respondent.

If it be true, as suggested by petitioner, that respondent may have accepted an allotment under the Act of 1882, this action would not estop him from claiming his original allotment under the treaty. *Hy-Yu-Tse-Mil-Kin v. Smith,* 194 U. S. 401. Though in almost every instance the surrender of possession of treaty allotments to new allotees under the Act of 1882, and the taking of other allotments by the treaty allotees under the Act of 1882, has worked a change of title to the old allotments by prescription, the action of the tribe or of individual Indians in acceding to the wrongful action of Congress, and in following the advice of the Interior Department and its agents, cannot estop this respondent from claiming his mother's allotment under the Treaty of 1865, which has been in their exclusive and uninterrupted possession since allotment up to the time of the filing of this case.

Had petitioner thought it possible to mend its case in this, or any other respect, objection to the form of the decree, ordering judgment for defendant, should have been made by motion for rehearing. The case was argued on the questions of law it presented, including the question of estoppel now suggested.

It is therefore respectfully submitted that the writ of certiorari should be denied.

HIRAM CHASE,
WILLIAM ROSS KING,
Solicitors for Respondent.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

UNITED STATES OF AMERICA, AS TRUSTEE and Guardian of the Omaha Tribe of Indians, and of Rose Wolf Setter, a member of said Tribe, Petitioner,
v.
HIRAM CHASE.

No. 447.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and, in accordance with the provisions of rule 26, section 5, moves the court to advance the above-entitled case for hearing at the beginning of the next term.

An action was brought by the United States in the District Court of the United States for the District of Nebraska on behalf of the Omaha Tribe of Indians in Nebraska and Rose Wolf Setter, a member of the tribe, against the respondent Chase, also an Indian, for rent of certain land alleged to have been allotted to Setter's ancestor under the act of August 7, 1882 (sec. 5), 22 Stat. 341, 342. Chase claimed the land

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through assignment to his ancestor in 1870 under the treaty between the United States and the Omaha Tribe of Indians of March 6, 1865 (art. 4), 14 Stat. 667, 668.

The treaty of 1865 provided among other things for the assignment of lands to the Omahas in severalty. The act of 1882 authorized the Secretary of the Interior to allot in severalty to the Indians of the tribe that portion of its reservation which includes the tract in controversy, and declared that the "allotments shall be deemed and held to be in lieu of the allotments or assignments" provided for by the treaty.

The question presented, therefore, is whether the assignment of lands made under the treaty vested such titles in the individual Indian assignees as would prevent Congress from providing for the allotment of the same lands thereafter.

The Government obtained judgment upon demurrer. The Circuit Court of Appeals for the Eighth Circuit reversed the trial court and instructed it to "render judgment on the merits of the case" in favor of Chase, the defendant below.

While the case involves only 40 acres of land on the Omaha Reservation, a decision in it will determine the status of something like 43,000 acres of land on that reservation which were assigned to Indians under the treaty of 1865 and which were subsequently allotted to Indians under the act of 1882. The decision of the Circuit Court of Appeals reverses a continuous departmental construction of

the act of 1882 under which rights worth several million dollars are held by various persons, most of them Indians, and renders doubtful the validity of the action of the Department of the Interior in its administration of the affairs of these Indians.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1917.

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CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

UNITED STATES OF AMERICA, AS TRUSTEE and Guardian of the Omaha Tribe of Indians, and of Rose Wolf Setter, a Member of said Tribe, petitioner,

v.

HIRAM CHASE.

No. 146.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an action of trespass instituted by the United States as trustee and guardian of the Omaha tribe of Indians, and of Rose Wolf Setter, a member of that tribe, against the defendant and present respondent, Hiram Chase. The damages sought are the rental value of 40 acres of land in the Omaha Indian Reservation in Nebraska, which the defendant Chase is alleged to have wrongfully occupied since the year 1885. Rose Wolf Setter, in whose behalf the suit is brought, claims as the widow and heir at law of Reuben Wolf, to whom the land in suit was allotted in 1899 under the provisions of the act of

Congress of August 7, 1882, c. 434, 22 Stat. 341, 342, and to whom a trust patent for the land was issued on the 7th day of March, 1902 (R. 1–4).

The defendant, Hiram Chase, claims the premises as the surviving child and heir at law of Clarissa Chase, likewise a member of the Omaha tribe, to whom there had been issued about the year 1870 by the Commissioner of Indian Affairs a certificate under section 4 of the treaty of March 6, 1865, 14 Stat. 667, 668, with the Omaha Tribe of Indians, whereby the land was assigned to the exclusive use and occupancy of the said Clarissa Chase and her heirs (R. 5, 6).

To the answer of Hiram Chase setting up this claim of title the United States demurred. The demurrer was sustained and judgment rendered for the plaintiff. Upon writ of error from the Circuit Court of Appeals for the Eighth Circuit this judgment was reversed and the cause was remanded to the District Court, with instructions "to render a judgment on the merits of the case in favor of Hiram Chase, the defendant below" (R. 17–22; 222 Fed. 593, 598).

A writ of certiorari brings the case to this court.

THE QUESTIONS INVOLVED.

The Circuit Court of Appeals neatly puts the question involved in the following language (R. 17):

> The question in this case is whether Hiram Chase, the sole heir of the grantee of a tract of forty acres of land under section four of the treaty of March 6, 1865, with the Omaha Tribe of Indians, 14 Stat. 667, 668, or Rose Wolf

> Setter, the sole heir of the grantee of the same land under section five of the act for the sale of a part of the reservation to the Omaha Tribe of Indians of August 7, 1882, 22 Stat. c. 434, pages 341, 342, has the title and the right to the possession of the tract.

In support of the present writ the Government insists:

(1) The demurrer to the answer was properly sustained by the District Court, and the Circuit Court of Appeals erred in not affirming its judgment.

(2) Even if the answer should be held to set up a good defense, the cause should have been remanded with instructions to overrule the demurrer, with leave to the plaintiff to plead over, and not with instructions to enter a final judgment on the merits.

ARGUMENT.

I.

The Omaha Indians enjoyed as to their reservation the tribal right of possession and occupancy. Certificates issued under the treaty of March 6, 1865, 14 Stat. 667, did not vest in the holders fee simple title, but simply the enjoyment in severalty of this tribal right.

The Nebraska reservation of the Omaha tribe of Indians was recognized by the treaties of July 15, 1830, 7 Stat. 328, and October 15, 1836, 7 Stat. 524. It was held by the tribe by the ordinary Indian right of possession and occupancy. *Doe* v. *Wilson*, 23 How. 457, 463; *Beecher* v. *Wetherby*, 95 U. S. 517, 525.

The first attempt which was made to induce the Indians to abandon their system of communal holding was that embodied in the treaty of March 16, 1854, 10 Stat. 1043, article 6 of which is as follows (p. 1044):

> The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a *permanent* home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of death of the head thereof, the possession and enjoyment of such *permanent* home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a *permanent* home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue

> in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such *permanent* home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have been assigned to them permanent homes, may be sold for their benefit, under such laws, rules, or regulations as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress. [Italics ours.]

This section, as will be observed, gave the President the power to assign to any adult Indian of the tribe who might be willing to avail of the privilege an allotment, to be enjoyed as a permanent home. It did not, however, disturb the tribal organization or

destroy the paramount right of the tribe over its entire reservation.

Both the Indians and the United States so understood it and accordingly entered eleven years later into the treaty of March 6, 1865, 14 Stat. 667, with which the present cause is concerned. Article 4, under which Hiram Chase claims title to the land in controversy, is in the following language (p. 668):

> The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each *head of a family* not exceeding one hundred and sixty acres, and to each *male person*, eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians. The lands to be so assigned, including those for the use of the agency, shall be in as regular

and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. *The whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation,* within and over which all laws passed or which may be passed by Congress regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent of Indian affairs or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him, shall be final and conclusive. *Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants;* and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress. [Italics ours.]

It will be observed that this article differs from that contained in the treaty of 1854 in that allot-

ments are no longer left to the discretion of the President, but are made as of right; that instead of being open as before to any and all Indians of the tribe willing to avail themselves of the privilege they are now restricted to heads of families and single male persons; and that the Commissioner of Indian Affairs is specifically named as the officer by whom certificates of assignment or allotment shall be issued.

Both treaties contemplated the permanent attachment of the Indian to the soil. The treaty of 1854 authorizes the President to "prescribe such rules and regulations as will insure to the family, in case of death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon," while the treaty of 1865 directs that the certificates shall specify "the names of the individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants." But neither treaty was designed to alter the tribal status of the individual allottee or to change the quality of his tenure. In each case the tribal organization remained intact, with dominion over the reservation as a whole; and in each case the tribe comprising both allottees and nonallottees had certain rights either of reverter or of preferential purchase in the specific allotment. The allottee takes as against the tribe only the right to enjoy in severalty his tribal right of occupancy and possession. His relation to the United States remains that of a tribal

Indian. His holdings are immune to local laws and taxes. *The Kansas Indians*, 5 Wall. 737. He could not sell or lease his land to individual whites or even authorize them to cross its boundaries. It is true he could now sell his land to the United States or to other members of his tribe, but both of these he could have done before. The United States could at all times before the treaty have purchased the land and have paid to him or to any other Indian or to the tribe such price as might be agreed upon therefor.

Had the treaty of 1865 intended to confer upon the allottee Indian an individual title in severalty and in fee it would have so declared in unmistakable terms. Appropriate language was not unknown, for by the treaty with the Wyandottes of January 31, 1855, 10 Stat. 1159, it was expressly agreed that their land should be allotted in severalty, and that patents in absolute fee simple should be granted to the competent allottees.

The intent of the contracting parties is further evidenced by the departmental action which immediately followed upon the treaty. The form of certificate which was adopted by the Commissioner of Indian Affairs, copy of which is printed as Appendix "A" to this brief (p. 25), declares only that—

> the said _____ is entitled to and may take immediate possession of said land, and occupy the same, and the United States guarantees such possession, and will hold the title thereto in trust for the exclusive use and benefit of _____ and _____ heirs so long as such occupancy shall continue.

The precise question was considered by the late Mr. Justice Brewer when on the Supreme Court of Kansas in *Veale* v. *Maynes*, 23 Kans. 1. That case dealt with the treaty of 1861 with the Pottawatomie Indians, which provided in language almost identical with that at bar for the assignment of the reservation to individuals of the tribe and for the issuance of certificates by the Commissioner of Indian Affairs "for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs." 12 Stat. 1191, 1192. Speaking of this treaty, Justice Brewer said (pp. 26, 27):

> * * * The treaty provided for a survey of all the lands and a census of the entire tribe, and then that certain quantities of land be assigned in severalty to those who desired thus to hold, and in common to the remainder. Now what was intended by this division—that the title be thus divided up, or the mere matter of occupancy? Of course either was within the power of the contracting parties. They might provide for a division among the several Indians which should vest an absolute title in each, beyond the power of the tribe or the government to disturb without the personal consent of the individual; or they might provide for an individualizing of the right of occupancy, giving to each person a sole right of occupancy in a particular tract, a right guaranteed against invasion by any individual, but

> still within the power of the tribe as a tribe to convey by treaty. In other words, while that remained the tribal home each individual desiring it should have separate control of certain lands, yet subject to the ultimate power of the tribe to change their home and to make absolute conveyance of the whole body of lands. The power of the tribe, *as a tribe*, remained undisturbed over both the allotted lands and those held in common. That this was the intent and effect of the treaty, we are constrained to hold, and this notwithstanding many expressions which, if used in ordinary contracts between individuals, would have marked significance to the contrary.
>
> * * * At present it is enough to notice that the allottee remained a member of the tribe, and if the intention had been to enlarge his title from the ordinary Indian title, one of occupancy, to that of a fee-simple, the intention would, it seems, have been expressed in unmistakable terms. If, on the other hand, a difference was to be made in the mere manner in which the various Indians occupied the tribal home, it was enough that that difference was made clear, and language used to indicate that should not be carried to some further meaning.

This decision was followed by the same court in the subsequent case of *Grinter* v. *Kansas Pacific Railway Company*, 23 Kans. 642, dealing with a like treaty, made with the Delaware Indians on May 30, 1860.

In short, the situation following the treaty in question was, in the language used in *Wiggan* v. *Conolly*, 163 U. S. 56, 63, that—

> * * * The land and the allottee were both still under the charge and care of the Nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge.

II.

The act of August 7, 1882, c. 434, 22 Stat. 341, providing for a new allotment, to be followed by patents in fee, was a valid agreement between the Omaha Indians and the United States and not an invasion of any vested right.

Believing that, in the language just quoted, "the land and the allottee were both still under the charge and care of the Nation and the tribe," a further readjustment of the situation was made by the Omaha tribe and the United States in the act of Congress of August 7, 1882, c. 434, 22 Stat. 341. Although this arrangement took the form of a statute rather than a treaty, it was none the less conventional in character, for the act is expressly conditioned upon "the consent of the Omaha Tribe of Indians expressed in open council," and such consent was formally given.

For convenient reference the entire act is printed as an appendix to this brief (Appendix "B," p. 27). Sections 5 and 6, under which Rose Wolf Setter claims the land in controversy, are as follows (p. 342):

> SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through

the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference

right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided further*, That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That, the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

History of the act.

For a full appreciation of the purpose of the act some knowledge of the circumstances of its adoption and enforcement is important.

The treaty of 1865 did not serve to put at rest the uneasiness of the Indians with regard to their lands. This uneasiness was greatly increased by the forcible removal about the year 1877 of the Poncas from their reservation in Nebraska to the Indian Territory. (Handbook of the American Indians, part 2, pages 278, 279.) The Poncas were neighbors of the Omahas and the two tribes spoke the same language. The latter felt that if the United States could remove the Poncas from their reservation they could probably remove the Omahas, and this feeling was enhanced by the actual introduction in Congress of measures to this end. The Omahas had lived on their land 200 years or more, and had as early as 1879 a surplus of farm products for sale (Report Commissioner of Indian Affairs, 1879, p. 108); they could not endure the thought of leaving their reservation and the homes and graves of their ancestors. (Report Agent Wilkinson, August 27, 1883, page 105, Report Commissioner of Indian Affairs, 1883.)

Accordingly, after consultation with their agents and teachers, the Indians memorialized Congress asking for an allotment act which would give to each individual an indefeasible property right to his land. See House Report 1530, Forty-seventh Congress, first session. Said they in this memorial (p. 2):

> We, the undersigned, members of the Omaha tribe of Indians, have taken out certificates

of allotment of land, or entered upon claims within the limits of the Omaha reserve. We have worked upon our respective lands from three to ten years; each farm has from five to fifty acres under cultivation; many of us have built houses on these lands, and all have endeavored to make permanent homes for ourselves and our children.

We therefore petition your honorable body to grant to each one a *clear and full title* to the land on which he has worked.

We earnestly pray that this petition may receive your favorable consideration, for we now labor with discouragement of heart, *knowing that our farms are not our own*, and that any day we may be forced to leave the lands on which we have worked. We desire to live and work on these farms where we have made homes, that our children may advance in the life we have adopted. To this end, and that we may go forward with hope and confidence in a better future for our tribe, we ask of you titles to our lands. [Italics ours.]

The result was the act in question, approved August 7, 1882, and which gave to the Indians the title that they sought. It was conditioned upon their acceptance of it in open council, and on the 5th day of May, 1883, such a council was duly held, the act was fully explained, and without a dissenting voice the Omahas consented to all of its provisions. (See Appendix "C," p. 33.)

An allotting agent was thereupon sent to allot the land. She went among the Indians, explained the law to each, and in 13 months had allotted lands to

practically all the Indians on the reservation. A copy of her report as the same appears on the files of the Department of the Interior is printed as Appendix "D" herewith (p. 35). Of the 331 certificates of assignment which had been issued under the treaty of 1865 she collected 230 and returned them to the Commissioner of Indian Affairs; 34 had previously been officially canceled; and the remaining 67 she reported as "lost by fire, flood or other accident."

Among the latter appears to have been that of Mrs. Hiram (Clarissa) Chase, the ancestor of the present defendant; but the defendant apparently having satisfied the alloting agent that his mother's certificate of assignment was lost, selected three forties of her land and one forty some miles away for his allotment, thus indicating his approval of the provisions of the law under which the allotments were made. All this land was duly allotted to him and in 1910 was patented to him in fee. It is true that these latter facts are not apparent on the face of the record with which the court is now called upon to deal, but it is not improper that they should be mentioned here and left for later comment in this brief.

Departmental construction.

There is no disposition to question the correctness or binding force of the decisions in *Choate* v. *Trapp*, 224 U. S. 665, 675; *Jones* v. *Meehan*, 175 U. S. 1; or *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, which were cited by the Circuit Court of Appeals in support

of its judgment. If a fair intendment of the treaty of 1865 was to grant to these Indians and their heirs such rights as to make their land individual property within the meaning of that term as known to our laws, both the tribe and Congress, whether acting jointly or separately, are without authority to deprive them of the right so granted.

But enough has been said to make it entirely clear that no such idea as to their rights was entertained. From 1865 to 1882 the department of the Government charged with administering the treaty undoubtedly construed it as giving to those to whom certificates were issued only the Indian rights of possession and occupancy. The very fact that these certificates were to be issued by the Indian Office and not by the General Land Office was significant, as conveyances of land were the peculiar province of the latter office. It appears also that the officers of the Interior Department encouraged the belief among the Indians that a new allotment act was necessary to protect them in their holdings against encroachment and that they cooperated in securing the passage of the act of 1882. Their construction as the executive officers of the Government charged with the administration of Indian affairs and all matters of Indian and public lands is entitled to great weight. *United States* v. *Arredondo*, 6 Pet. 691; *United States* v. *Holliday*, 3 Wall. 407; *Geofroy* v. *Riggs*, 133 U. S. 258.

Upon at least two subsequent occasions the Department of the Interior has expressed its view of the matter in deliberate language. In a letter

from the Acting Secretary of the Interior to the Commissioner of Indian Affairs on January 15, 1900 (see Appendix "E," p. 45), the Secretary says:

> By the terms of the treaty (of 1865), therefore, the lands assigned, as above indicated, constituted and were to be known as the Omaha reservation, and could be alienated or disposed of only to the United States or to other members of the tribe—in other words, although assigned for specific purposes, these lands still remain the common property of the tribe, subject to disposal by them within the limits provided by the treaty. And the lands thus being the common property of the tribe, assignments of particular parts thereof to individual members in severalty conveyed to them only the right of use and occupancy, and that right could only be established and maintained by improvement and occupancy. And the provision for descent was also conditional, so that, in the event of the demise of assignees, heirs and descendants might retain the exclusive use and benefit of the assigned tracts; but subject to disposal by the tribe as in the case of original holders.

This ruling was reaffirmed in a letter from Secretary E. A. Hitchcock to the Commissioner of Indian Affairs bearing date July 18, 1901, and initialed by the then Assistant Attorney General for the Department of the Interior (see Appendix "F," p. 49), in which letter, dealing with the specific controversy now before the court, the Secretary says:

> It was held in departmental letter of January 15, 1900, referred to in your office letter sub-

> mitting this matter, that the lands assigned to individual members under the treaty of 1865 still remained the property of the tribe, the individuals taking under such assignments only the right of occupancy, and that the act of 1882, which was assented to by the tribe and which provided for the sale of a part of their lands and for the allotment in severalty of the remainder thereof, superseded the treaty of 1865. Under this ruling the heirs of Reuben Wolf, allottees under the act of 1882, have the better right to the tract in controversy and should be put in possession thereof.

This ruling by the department of the Government charged with the responsibility of administering the act may well be held, as in *United States* v. *Hammers*, 221 U. S. 220, 229, to be "determinately persuasive."

The proviso to section 4.

The Circuit Court of Appeals found support for its opinion in the proviso to section 4 of the act of 1882. This section and the proviso are in the following language:

> That when purchasers of said lands shall have complied with the provisions of this act as to payment, improvement, and so forth, proof thereof shall be received by the local land office at Neligh, Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts: *Provided*, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

It will be observed that sections 1, 2, 3, and 4 of the act deal with the sale of that portion of the Omaha reservation lying west of the right of way granted to the Sioux City and Nebraska Railway Company. This portion was to be sold for the benefit of the Indians, and the proviso was clearly designed to protect from such sale any settlement rights which the Indians might have acquired in that portion of the reservation with which these sections of the act were dealing. The remaining sections of the act take up the entirely different question of the reallotment of the residue of the reservation. What the design was with regard to the certificates issued under the treaty of 1865 is not left to doubtful inference, based upon this proviso to the preceding section. On the contrary, it is declared in section 5 in express terms that after the making of these allotments "the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void." See *Sloan* v. *United States*, 95 Fed. 193; *Sloan* v. *United States*, 118 Fed. 283.

The answer of Hiram Chase, it may be said in passing, also avers that the title of Rose Wolf Setter is invalid because the patent to Reuben Wolf was not issued until after his demise. This question is set at rest by *Skelton* v. *Dill*, 235 U. S. 206, and *United States* v. *Bessie Wildcat*, 244 U. S. 111.

III.

Conceding, arguendo, that the judgment of the District Court on the demurrer to the answer should have been reversed, the cause should have been remanded with leave to the plaintiff to reply.

In the light of what has been said it is of course insisted that the Circuit Court of Appeals erred in reversing the judgment entered by the District Court upon the demurrer. But conceding for the sake of argument that the Circuit Court of Appeals properly interpreted the law, it should nevertheless have remanded the cause to the court below for further proceedings, rather than with instructions to enter judgment as upon the merits.

The action is one at law and is therefore governed by the provisions of the Conformity Act. Section 7711 of the Revised Statutes of Nebraska, 1913, in force at the time of this trial, is as follows:

> Upon a demurrer being overruled the party who demurred may answer or reply, if the court be satisfied that he has a meritorious claim or defense and did not demur for delay.

As hereinbefore stated, the records of the General Land Office disclose that the defendant Hiram Chase, on the 28th day of March, 1884, selected as his allotment under the act of August 7, 1882, three forties of the land described in his mother's certificate of assignment and one forty in another section and range; that for this allotment he received a trust patent on the 7th day of July, 1884, and a final patent in fee on the 10th day of March in the year

1910. This selection was received by him under the terms of the statute in lieu of the allotments or assignments provided for in the treaty of 1865, and estopped him, as the Government will contend if pressed to a further trial of the cause, from claiming in addition thereto any benefits derived from that treaty. It can not be that the defendant could at one and the same time claim the benefits of this statute for himself but deny its validity in respect to the rights of others. These facts, together with any other pertinent defenses, the plaintiff should be permitted to present to the court below before any judgment could be entered for the defendant upon the merits.

The practice followed should have been that pursued in *County of Dallas* v. *MacKenzie*, 94 U. S. 660, in which a demurrer to the answer had been sustained by the Circuit Court. Upon reversal this court held that (p. 664)—

> the judgment must be reversed, and the cause remanded to the Circuit Court with directions to enter judgment upon the demurrer for the defendant below, unless the plaintiff below shall withdraw his demurrer and proceed to trial, within such time and upon such terms as the Circuit Court may direct; and it is so ordered.

CONCLUSION.

It is submitted, however, that the act of 1882 was a valid exercise of the control which the Omaha tribe and the United States jointly possessed over

this reservation, and that in accordance with that act the title of Rose Wolf Setter in the premises is superior to the title of the defendant Chase.

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court should be affirmed.

JOHN W. DAVIS,
Solicitor General.

SEPTEMBER, 1917.

APPENDIX "A."

(FORM OF CERTIFICATE UNDER THE TREATY OF 1865.)

No. —.

DEPARTMENT OF THE INTERIOR,

OFFICE OF INDIAN AFFAIRS,

----------, 187 .

This is to certify that ----------, a member of the Omaha tribe of Indians, having expressed a desire to adopt habits of settled industry, and to receive an allotment of lands for the purposes of cultivation, as provided for in the 4th article of the treaty with said tribe, concluded March 6, 1865, is entitled to----------acres of land, and that he has selected for such purposes the---------- ----------of Section----------, in Township----------North, of Range---------- ----------East of the 6th Principal Meridian in Nebraska.

The said----------is entitled to, and may take immediate possession of said land, and occupy the same, and the United States guarantees such possession, and will hold the title thereto in trust for the exclusive use and benefit of---------- ----------and----------heirs so long as such occupancy shall continue.

THIS CERTIFICATE is not assignable except to the United States, or to other members of the tribe under such rules and regulations as may be hereafter prescribed by the Secretary of the Interior, and

the said_____is expressly prohibited from assigning or attempting to assign the same, and from selling and transferring the said land, or disposing of the same, or any interest therein, to any person or persons whomsoever (except as above named,) under penalty of an entire forfeiture thereof.

_____,

Commissioner.

APPENDIX "B."

(ACT OF AUGUST 7, 1882, C. 434, 22 STAT. 341.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each bona fide settler, occupying any portion of said lands, and having made valuable improvements thereon, or the heirs at law of such settler, who is a citizen of the United States, or who has

declared his intention to become such, shall be entitled to purchase, for cash, through the United States public land office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act: *Provided*, That the Secretary of the Interior may dispose of the same upon the following terms as to payments, that is to say, one-third of the price of said land to become due and payable one year from the date of entry, one-third in two years, and one-third in three years, from said date, with interest at the rate of five per centum per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he might have made: *And provided further*, That whenever any person shall under the provisions of this act settle upon a tract containing a fractional excess over one hundred and sixty acres, if the excess is less than forty acres, is contiguous, and results from inability in survey to make township and section lines conform to the boundary lines of the reservation, his purchase shall not be rejected on account of such excess, but shall be allowed as in other cases: *And provided further*, That no portion of said land shall be sold at less than the appraised value thereof, and in no case for less than two dollars and fifty cents per acre: *And provided further*, That all land in township twenty-four, range seven east, remaining unallotted on the first day of June, eighteen hundred and eighty-five, shall be appraised and sold as other lands under the provisions of this act.

SEC. 3. That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

SEC. 4. That when purchasers of said lands shall have complied with the provisions of this act as to payment, improvement, and so forth, proof thereof shall be received by the local land office at Neligh, Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts: *Provided*, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one sixteenth of a section; which allot-

ments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided further*, That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according

to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That, the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

SEC. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That from the residue of

lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section six of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: *And provided further*, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe: *Provided*, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

SEC. 9. That the commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at the rate of five dollars for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.

SEC. 10. That in addition to the purchase, each purchaser of said Omaha Indian lands shall pay two dollars, the same to be retained by the receiver and register of the land office at Neligh, Nebraska, as their fees for services rendered.

Approved, August 7, 1882.

APPENDIX "C."

(CONSENT OF OMAHA TRIBE TO ACT OF 1882—FROM THE FILES OF THE DEPARTMENT OF THE INTERIOR.)

UNITED STATES INDIAN SERVICE,
OMAHA, NEBRASKA AGENCY,
May 5th, 1883.

I certify on honor that on this 5th day of May 1883, the Omaha tribe of Indians being assembled in open council; the Act of Congress, entitled, "An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes," approved August 7th 1882, was read and fully explained to them by the Official Interpreter, and that they did then and there consent to and approve the provisions of the said act of Congress.

GEO. W. WILKINSON,
U. S. Indian Agent.

Witness:
WILLIAM C. MCBEATH,
Clerk.

Interpreters Certificate.

I certify on honor that the Act of Congress entitled, "An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes," approved August 7th 1882, was this day read to the Omaha tribe of Indians in open council assembled, and by me

correctly interpreted to them, and that they clearly understood the nature and conditions thereof before consenting thereto.

JOHN PILCHER,
Interpreter for Omaha.

OMAHA AGENCY, NEBR.
May 5th 1883.
Witness:
WM. C. MCBEATH,
Clerk.

APPENDIX "D."

(REPORT OF ALLOTTING AGENT UNDER ACT OF 1882—FROM THE FILES OF THE DEPARTMENT OF THE INTERIOR.)

UNITED STATES INDIAN SERVICE,
OMAHA AGENCY, NEBR.,
June 25, 1884.

To the Honorable Commissioner of Indian Affairs.

Sir: In accordance with your letter of instructions dated April 21, 1883, I have the honor herewith to submit the report of my work in allotting the Omaha Indians in Severalty upon their lands according to the Act of Congress approved August 7, 1882.

On May 12, 1883, I arrived at the Omaha Agency and began preparations at once to carry out the work in the manner which my knowledge of the people led me to believe would be of most benefit to them in the future and give them an insight into the forms and obligations of our modes of procedure in business. To this end I was soon camped among the people, to whom I was no stranger and who gathered about me in daily increasing numbers. The Omahas have inhabited the region of their reservation for many generations and are familiar with every rood of the land and deeply attached to the locality, this peculiarity was an important factor in allotting the people and one which enhanced the difficulties of the work. The present remarkable advancement of the tribe has been due to the influence of wise leaders among the people and during the past two or three years the progressive men have been discussing the expediency of leaving their old

selections of 1871, taken amidst the bluffs of the Missouri, and of opening up new farms in the Valley of the Logan, where the land is well adapted to agriculture.

In order to strengthen this plan, and afford encouragement to so great and desirable a change, my first camp was pitched in the Logan Valley, lying in the western part of the Reserve. Every day I went with the Indians and aided them in their selections and advised them as to their work in starting their new homes. The Surveyor was with me and re-established the corners of sections where needful and rendered such other assistance as was consistent with his duties. Each allotment was personally known and seen by me, and each Indian made familiar with his land marks and taught the use of the township plats. Every allotment was entered upon my field note books and the family relationships accurately ascertained. As the men, women and children were located, each adult and those children who were old enough to understand something of the business in hand were made fully acquainted with the position and extent of the land which was to become their own by patent.

In connection with this close personal superintendence in allotting the lands, the laws of property and of legal descent were explained to the people, a matter difficult for them to fully comprehend, owing to their previous customs and modes of thought. This difficulty was marked in regard to the rights of children to their deceased parents property, such claims being secondary to those of lateral relationship in Indian society; ar , also, the absorbing of the wife's right to land in that of her husband, it seeming unjust to the Indian that the

wife should not possess land distinctive from her husband, she being as responsible as he regarding the family. These and other points were made clear according to our laws, and the intelligence thus gained by a large portion of the people will be of benefit in many ways in the near future.

After an allotment had been made, the Indian was allowed some little time for further thought and consultation, as it was a rule laid down by me, that when an individual signed the paper of "Selection" the act was final and could no longer be open to reconsideration. Considerable formality attended the making out and signing of the paper of "Selection". Each man and woman made his or her mark in the presence of witnesses chosen by the signer. Such witnesses appending their names whenever it was possible for them to do so, and in the event of their not being able to write, other witnesses were called in to attest the signature. This formality brought each Indian in direct responsibility with his or her choice of land and taught the importance attached to the signing of the name, and the guards placed about the act by our forms and customs. The use and destination of these signed papers of "Selection" were carefully and fully explained, as well as the series of checks instituted by the Department to insure against mistakes. To do the work in this manner took both time and patience, but it has left a permanent value among the people. They often expressed their appreciation of this method by saying:

"You treat us as men, and make us feel that we stand as men. We are now strong upon our land and will go forward fearing no one."

According to the schedule of allotments furnished me by the Indian Office, 331 certificates were issued

to the Omaha tribe in 1871. 34 of which were canceled officially. Of the 297 left with the Indians 230 are herewith returned. These papers have been carefully preserved, and the 67 certificates missing were all accounted for to me, they having been lost by fire, flood or other accident. As far as possible the regard shown these papers has been fully respected, and principal portion of the land thus covered is reallotted to the same persons mentioned in the certificates, their descendants or near relations. The inroads of the Missouri river had carried away a few allotments, and about a score were unclaimed and undesired. There were several cases of contest over the same piece of land the trouble growing out of a party entering upon the land and making permanent improvements, with or without the knowledge of the holder of the certificate. In some instances the latter party fancied he had a superior right to the land and its improvements by virtue of the possession of the certificate alone. All these cases were disposed of in accordance with the provisions of Sec. 5 of the Act of Congress approved Aug. 7, 1882. The justice of the decisions rendered were recognized and the value and relation of work to property, and the establishing of rights thereby were brought to the knowledge of the people in a clear and forcible way. In all contested cases of whatever character, the trial was always appointed for a given time, when each party was required to be present with witnesses to establish his statement and he was also to choose and bring his own interpreter. All the evidence was taken down in writing at the time and after due consideration the decision rendered. In many cases a written copy of the decision was furnished to each contestant. In this manner all disputes and quarrels

on the Reservation, which came within the scope of my work have been settled. Many of these contentions were of long standing, some had engendered bitterness for over ten years and been the cause of considerable trouble to the officials and the people.

The claims of mixed-blood relatives of the Omaha tribe have occupied considerable time not only in taking the evidence offered, in attending counsels with the Indians, held to consider these claims, but in preparing reports, correspondence &c. Some cases have been very persistent but all are finally disposed of in accordance with the law governing these allotments. Having been instructed that the Act of August 7, 1882 refers back to the Treaty of March 6, 1865, which states that the mixed bloods then residing with the Omaha tribe were entitled to land upon the Omaha reservation and to allot the land as the law directs it was clearly my duty to exclude all mixed blood claimants who could not prove their claims by having had a certificate of allotment issued to them in 1871, these allotments having been approved by the Chiefs of the tribe and the Department of the Interior, or else who could establish their residence on the reservation in 1865 by evidence acceptable to the tribe in open Council, at which time the claims were fully and freely discussed in the presence of the contesting parties or their representatives. A full report of each case wherein the mixed-blood claim was not admitted by the tribe, has been rendered the Department for approval. With one exception all mixed-blood claimants have left the reservation, this exception is Mrs. Margaret Sloan and her grandson Thomas Sloan. The latter has made considerable improvements upon the W /2 of NE /4 of Sec. 20, Township 24, Range 8 E.

This land is unallotted in order to prevent any future complication upon the reservation.

A complete Registry of the tribe by families has been made and indexed. Space was left for the increase of children and the formation of new families. Opposite each name on the margin of the page was placed the number of the selection for allotment, the same number was also written in its respective place upon the town-ship plats left at the Agency, thus affording a complete series of reference as to each individual.

The use of the Registry has been explained to the Indians who were advised to report each birth, marriage and death at the Agency that the record of the land might be properly kept. In the event of a birth, the Indians were advised to also report the particular 40 acres in the unallotted portion of the land desired to become the property of the child, as by the Act of August 7, 1882 the unallotted land is devoted to the children born after the completion of this allotment.

By thus registering, many future troubles and disputes will be prevented and the unallotted land gradually be made profitable. Another important point connected with this registry is, that it is now possible for the Agent to know who constitute the rightful members of each family, and as substantial progress among any people is retarded until the family relation is made stable and hedged about with protective influences, the officers of the Government can henceforth intelligently and effectively maintain the family relation in accordance with the laws of our country. In view of the peculiar difficulty in obtaining exact information I cannot but consider the establishment of this complete Registry of the

families of the tribe as one of the most important acts connected with the work instrusted to me, and if the Registry is kept up and carefully used it will become a means of untold value morally and socially in promoting the prosperity and growth in civilization of the people.

The distribution of the "Certificates" of allotment began on June 5, 1884, and was completed on the 8th. Each certificate was checked upon the Registry as it was given out. The accompanying selections have all been signed and witnessed as before described, except two, those of Mary and Elizabeth Harvey, orphans, who were absent from the reservation and with whom I could not obtain any communication. They are located upon the land covered by their mother's certificate of 1871. The "Selections" number from 1 to 954, and are distributed as follows:

Township 24, Range 10 E.—No. 1 to No. 123.

Heads of families	59
Minor children	52
Single adults	11

Total acres allotted, 12,208.00.

Township 24, Range 9 E.—No. 123 to No. 340.

Heads of families	54
Minor children	133
Single adults	30

Total acres allotted, 16,056.09.

Township 24, Range 8 E.—No. 340 to 467.

Heads of families	31
Minor children	80
Single adults	16

Total acres allotted, 9,423.74.

Township 24, Range 7 E.—No. 467 to No. 572.

Heads of families	27
Minor children	56
Single adults	22

Total acres allotted, 8,231.36.

Township 25, Range 10 E.—No. 572 to No. 595.

Heads of families	11
Minor children	10
Single adults	2

Total acres allotted, 2,326.27.

Township 25, Range 9 E.—No. 595 to 740.

Heads of families	54
Minor children	72
Single adults	19

Total acres allotted, 13,060.21.

Township 25, Range 8 E.—No. 740 to No. 832.

Heads of families	24
Minor children	53
Single adults	15

Total acres allotted, 7,155.88.

Township 25, Range 7 E.—No. 832 to No. 872.

Heads of families	3
Minor children	28
Single adults	9

Total acres allotted, 2,381.86.

Township 25, Range 6 E.—No. 872 to No. 926.

Heads of families	8
Minor children	35
Single adults	10

Total acres allotted, 3,549.31.

Township 26, Range 9 E.—No. 926 to No. 941.

Heads of families	5
Minor children	5
Single adults	5

Total acres allotted, 1,496.96.

Township 26, Range 8 E.—No. 941 to No. 954 (inclusive).

Heads of families	3
Minor children	11
Single adults	0

Total acres allotted, 920.

Total number of acres allotted on the reservation, 76,809.68.

878.60 acres were allotted west of the Sioux City and Nebraska R. R. upon that portion of the Reserve since opened to white settlement.

Present area of the reservation	131,380.85 acres
Allotted within that limit	75,931.08
Acres unallotted	55,449.77

At the close of the allotments and prior to the distribution of the "Certificates" of Selection, the Councilmen were called together and the entire list of allotments read over to them. The plats were spread and the allotted and unallotted portions of the land pointed out and number of acres given. The leading men of the tribe cannot plead ignorance as to the allotments, as they have been in constant communication with me during the past thirteen months and cognizant of every act affecting the interests of claimants.

At the Council called soon after my arrival on the reservation in explaining the work I had been sent to do, I told the tribe I should act with their full knowledge and as far as possible, with their approval, and laid down certain rules to be observed in the work. My word has been kept to the people in every particular, as they reminded me publicly the last time we met in council.

Under the influence of this work of allotting, the people have made a marked advance, not only in their farming, but in thinking and planning for their future welfare and advancement. Upon the land allotted a year ago in the western part of the reservation near to the Railroad, over two hundred acres of the prairie have already been broken, and a few houses built, two of these are west of the Railroad. Groves are being planted, and should the present year bring good crops, next year will see many men breaking land and preparing to move out into the immediate vicinity of the White settlements where the future promises a steady growth in civilization.

I would acknowledge my indebtedness to the Agent and officials at the Agency in cordially seconding my plans and rendering every assistance to make the work successful.

I desire to make especial mention of the faithfulness of Mr. Frank La Flesche, who was detailed to accompany me as my clerk. He worked uncomplainingly twelve to fourteen hours a day, and performed all services willingly. His intelligent knowledge of his native tongue and of English, together with an appreciation of the needs of his people in their onward struggle, made his services doubly valuable. His record is worthy of the highest commendation.

Trusting that the work accomplished may meet with your approval, I remain,

Respectfully,

A. C. FLETCHER.

APPENDIX "E."

(LETTER OF ACTING SECRETARY RYAN—FROM THE FILES OF THE DEPARTMENT OF THE INTERIOR.)

E. E. M. J. T. B.

DEPARTMENT OF THE INTERIOR,
Washington, January 15, 1900.

THE COMMISSIONER OF INDIAN AFFAIRS.

SIR: I am in receipt of your letter of the 29th ultimo, submitting an appeal of Thomas L. Sloan, Attorney, of Pender, Nebraska, dated December 4, 1899, from the action of your office in refusing to entertain the claims for allotments of the heirs of Rosalie Woodhull and Mrs. Hiram Chase, deceased Omaha Indian women.

In the case of the heirs of Mrs. Woodhull, Mr. Sloan, on September 27, 1899, submitted the claim that an assignment of land had been made to her under the provisions of article 4 of the treaty of March 6, 1865, and that said assignment was approved by the Secretary of the Interior on January 26, 1871; that by virtue of the provisions of the treaty such assignments of land in severalty, when approved by the Secretary, became final and conclusive, for the benefit of the assignees, their heirs and descendants, and that original selections and allotments, and the approval thereof, constituted a vested right to the land so assigned.

Article 4 of the treaty of 1865 provided for the assignment of the tribal lands to each head of family and each male person, eighteen years of age and over, without family, in specified but varying quantities, and a tract was also set apart for agency purposes.

It was also provided that the "whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation."

And it was further provided that "Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him, shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior." (14 Statutes, 667).

By the terms of the treaty, therefore, the lands assigned, as above indicated, constituted and were to be known as the Omaha reservation, and could be alienated or disposed of only to the United States or to other members of the tribe—in other words, although assigned for specific purposes, these lands still remained the common property of the tribe, subject to disposal by them within the limits provided by the treaty. And the lands thus being the common property of the tribe, assignments of particular parts thereof to individual members in severalty conveyed to them only the right of use and occupancy, and that right could only be established and maintained by improvement and occupancy. And the provision for descent was also conditional, so that, in the event of the demise of assignees, heirs and descendants might retain the exclusive use and

benefit of the assigned tracts; but subject to disposal by the tribe as in the case of original holders.

By Act of Congress approved August 7, 1882, (22 Statutes, 341,) provision was made for the sale of a part of the reservation, with the consent of the Indians, and, under like conditions, for the allotment in severalty of the remainder of the reservation, in specified quantities, to heads of families and other persons named in the act, which allotments should be deemed and held to be in lieu of the assignments provided for by the treaty of 1865:

"*Provided*, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of the said fourth article, and who has made valuable improvements thereon, and any Indian who, being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved said tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section." (Section 5).

It seems that patent for the tract assigned to Mrs. Woodhull, now claimed by her heirs, was issued to U. S. Grant, an Omaha Indian, in 1884, and Mr. Sloan, as attorney for the heirs, claims that the patent to Grant is absolutely void, and that the latter is accountable to the heirs for the rents arising from the said lands, and asks that some plan of compromise and settlement of the differences between the parties claiming interest in the lands be suggested, to save costs and delay of litigation.

It does not appear that the land assigned to Mrs. Woodhull under the treaty of 1865 had ever been

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improved or occupied by her; but it is presumed that Grant, to whom it was allotted and patent issued under the act of 1882, improved and occupied the same.

The act of 1882 provided that the allotments thereunder should be in lieu of the assignments made under the treaty of 1865, and the Omahas having duly accepted the provisions thereof, assignees under the treaty are without recourse, except as provided in the act.

The appeal of Mr. Sloan is, therefore, dismissed, and the papers received with your letter are herewith returned.

Very respectfully,

THOS RYAN,
Acting Secretary.

8615, Ind. Div., '99.
7 inclosures.
M. E. W.

APPENDIX "F."

(LETTER OF SECRETARY HITCHCOCK—FROM THE FILES OF THE DEPARTMENT OF THE INTERIOR.)

W. V. D. W. C. P.

DEPARTMENT OF THE INTERIOR,

Ind. Div. *Washington, July 18, 1901.*

4219–1901.

The COMMISSIONER OF INDIAN AFFAIRS.

SIR: From your letter of May 25, 1901, and accompanying papers, it seems that the SW. ¼ of the SE. ¼ of Sec. 25, T. 25 N., R. 9 E., Nebraska, was allotted to Reuben Wolf, an Omaha Indian, under the provisions of the act of August 7, 1882 (22 Stat., 341), that Hiram Chase, an Omaha Indian, is in possession of said land, claiming it as heir of his mother, Mrs. Hiram Chase, to whom it, with other tracts, was assigned under the treaty of March 6, 1865 (14 Stat., 667), and that the heirs of Reuben Wolf have asked your office to take appropriate action to put them in possession of the land thus allotted to him and for which a trust patent was issued to him. You have submitted the matter to the Department for consideration and direction as to the proper course to pursue.

It was held in departmental letter of January 15, 1900, referred to in your office letter submitting this matter, that the lands assigned to individual members under the treaty of 1865 still remained the property of the tribe, the individuals taking under such assignment only the right of occupancy, and that the

act of 1882, which was assented to by the tribe and which provided for a sale of a part of their lands and for the allotment in severalty of the remainder thereof, superseded the treaty of 1865. Under this ruling the heirs of Reuben Wolf, allottee under the act of 1882, have the better right to the tract in controversy and should be put in possession thereof.

You will therefore cause to be prepared a full and complete statement containing a history of the respective claims, with references to the treaties, laws and decisions involved, that the matter may be submitted to the Department of Justice with a view to the institution of such legal proceedings as may be necessary to put the proper parties in possession of said tract of land.

The papers accompanying your letter of May 25, 1901, are herewith returned.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

2 inclosures.

○

No. 146.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1917.

UNITED STATES OF AMERICA AS TRUSTEE, AND GUARDIAN OF THE OMAHA TRIBE OF INDIANS, AND OF ROSE WOLF SETTER, A MEMBER OF SAID TRIBE,

Petitioner,

VS.

HIRAM CHASE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR HIRAM CHASE.

REED PRINTING CO.

CASES CITED.

IN THE SUPREME COURT OF THE UNITED STATES.

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HIRAM CHASE.

No. 146.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR HIRAM CHASE.

(Opinion of court below reported in 222 Fed. 593.)

The principal facts of the case are sufficiently stated in the opinion of the court below. (R. p. 16).

The respondent's contentions are:

1. The answer presented a complete defense on the basis of the rights of Hiram Chase.

2. It will appear from the face of the record that the plea of estoppel which the government contends it should have been permitted to set up by way of reply would have been of no avail and that the action was properly ordered dismissed by the Circuit Court of Appeals.

3. The answer was not demurrable because it set forth facts the legal effect of which is that the title of Rose Wolf Setter is not superior to that of the defendant Chase.

ARGUMENT.

I.

THE TREATY WITH THE OMAHA INDIANS OF MARCH 6, 1865, 14 STAT. 667, VESTED IN THE INDIVIDUAL INDIAN TITLE TO THE LAND IN SEVERALTY TO THE EXCLUSION OF THE OTHER MEMBERS OF THE TRIBE AND NOT A MERE POSSESSORY RIGHT CARVED OUT OF THE TENURE IN COMMON BY THE TRIBE, DEFEASIBLE BY THE SUBSEQUENT ACTION OF THE TRIBE OR OF THE UNITED STATES.

The terms of the treaty import a grant to the Indian of title in fee.

The early treaty with the Omahas of March 16, 1854, 10 Stat. 1043, Art. 6, which is set out in the brief for the United States, pages 4 and 5, so far as it concerned the issuance of "patents" in severalty was discretionary with the President and was never carried out. But it contemplated without very definite provision therefor, a surrender by the tribe of its communal rights and an individual exclusive right in the land. The fact that it provided for a right or title defeasible upon abandonment does not indicate that the Indian was to have less than a fee.

The fact that this treaty did not provide for the abolition of the tribal government is not conclusive. *The Kansas Indians*, 5 Wall. 737, 740, 755. The continued existence of a reservation and of a tribal government in nowise indicates that it was intended that the *tribe* should have any *right in the land* which the President might allot *in severalty*.

As each successive treaty was primarily for the purpose of obtaining a cession of lands from the Indians to be open for settlement or as in this case for a reservation for another tribe, so the treaty of March 6, 1865, 14 Stat. 667, under which Clarissa Chase received an allotment, was negotiated with that object in view. Incidentally another attempt was made to induce the

Omahas to take allotments in severalty. The first three articles provide for a cession of their lands, payment therefor, and extending certain unimportant articles of the former treaty. Article 4 of the treaty of 1865 which is set out in full in Appendix "A" 8, this brief p. 29, provided as follows:

"The Omaha Indians being desirous of promoting settled habits of industry and enterprise among themselves *by abolishing the tenure in common by which they now hold their lands,* and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purpose; and that out of the same *there shall be assigned* to each head of a family not exceeding 160 acres, and to each male person 18 years of age and upwards, without family, not exceeding 40 acres of land. * * * The whole of the lands, assigned or unassigned, in *severalty,* shall constitute and be known as the Omaha reservation, within and over which all laws passed or which may be passed by Congress, regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent of Indian affairs or the agent for the tribe. Said division and assignment of lands to the Omahas *in severalty* shall be made under the direction of the Secretary of the Interior and when approved by him shall be *final* and *conclusive.* Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of individuals to whom they have been assigned respectively, and that they are *for* the *exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, lease or otherwise disposed of except to the United States or to other*

members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior and they shall be exempt from taxation, levy or forfeiture until provided for by Congress." (Italics ours.)

If this treaty was one of several progressive steps in a preconceived plan it would increase the Indian's rights under the patents in severalty contemplated by the treaty of 1854, and must necessarily have resulted in a grant of title. It was however only a second experiment to induce the Indians to take land individually. It provided in more specific terms what the character of the individual holding should be. It was no longer open for either the Indians or the government to permit the holding of the land as community property except such surplus lands as should remain unallotted after a distribution, not to all the members of the tribe, *but to heads of families and males over eighteen;* allotments to these were to be made of right. This treaty specifically states that the intention is to "*abolish the tenure in common,*" and to distribute the land "*in severalty*" to the members of the tribe. The *abolition* of the tenure in common definitely indicates more than a mere temporary readjustment of possessory rights such that the tribe *retains* control over or right to dispose of the land. It involves a contraction in terms that after "abolishing" the tenure in common the tribe as a whole still *has* rights in the land. (c. f. *Goat vs. U. S.,* 224 U. S. 458, and *Woodward vs. DeGrafenried,* 238 U. S. 284, 291.) The thought that upon individual allotment to the Indian he obtained his rights directly from the tribe and therefore took only the same rights of possession, was definitely abandoned as early as *Jones vs. Meehan,* 175 U. S. 1, 12, 13.

The right granted is "*exclusive*" both of the tribe and of the other members thereof. It contemplates tenure by an individual and it contains the additional specific provision that the certificate (the "patent" as it was designated in the earlier treaty) should specify that the land should be held for the exclusive use and benefit of the Indian, his "*heirs,*" and descendants; and said tracts shall not be alienated *in fee* * * *" These words without any accompanying limitation of time represent a *descendible interest* in the land and supply all of the essential elements of fee simple title. *U. S. vs. Brooks,* 10 Howard 442; *Best vs. Polk,* 18 Wall. 112, 116; *Libby vs. Clark,* 118 U. S. 250, 255; *Francis vs. Francis,* 203 U. S. 233, 240; *Goat vs. U. S.,* 224 U. S. 458, 470. The restriction on "alienation in fee" presupposes fee simple title. Exemption from taxation, sale or forfeiture would also have been an unnecessary provision had a mere right of possession been intended.

Neither the defeasible title nor right of reverter provided for in the treaty of 1854 nor of preferential purchase in the specific allotment under the terms of the treaty of 1865 is tantamount to *tribal* rights in the land so long as it continues to be held by the individual in severalty. Here again, as by the treaty of 1854, the continuance of tribal government and of the reservation does not negative title. Individual ownership after these treaties were entered into was recognized by the tribe. There was nothing to prevent a continuance of tribal government with individual rights. Provision for allotment did not necessitate the immediate abolition of tribal relationships and the grant of citizenship and liability to taxation.

The tribal organization was very properly continued without complete emancipation from disabilities but *for*

civil and political purposes. In re Heff, 197 U. S. 488, 504; *Hallowell vs. United States*, 221 U. S. 317; *Tiger vs. Western Improvement Co.*, 221 U. S. 386. Indeed, *private property rights* are the first rather than the last step toward the civilization of the Indian. These property rights under such conditions were protected by the Government and the Constitution (*Choate vs. Trapp*, 224 U. S. 665, 667), as well as being recognized by the tribe. And though laying stress upon the continuance of the tribal government and the reservation, the Solicitor General admits that "if a fair intendment of the treaty of 1865 was to grant to these Indians and their heirs such rights as to make their land individual property within the meaning of that term as known to our laws, *both the tribe and Congress, whether acting jointly or separately,* are without authority to deprive them of the right so granted.

The well established rule of construction of Indian treaties must compel the conclusion that this treaty conveyed complete title. The judicial construction of terms in Indian treaties, often less formal for this reason, has been held to vest title. *Jones vs. Meehan*, 175 U. S. 1. In a number of cases there reviewed at length by Mr. Justice *Gray* the treaty did not contain technical words of grant or even of inheritance as contained in the treaty of 1865. Some of these involved treaties making reservations to chiefs and head men; others as in the case at bar, were to the members of the tribe. *Jones vs. Meehan*, 175 U. S. 1, 13, 23, *semble; Best vs. Polk*, 18 Wall. 112; *Libby vs Clark*, 118 U. S. 250, *semble.* To say that had the treaty of 1865 intended to confer title in severalty in fee, it would have so declared in unmistakable terms, is to disregard the rule respecting Indian treaties, which is exactly to the contrary. *Choate vs.*

Trapp, 224 U. S. 665, 675. What matters it for example, that the treaty provided for issuance of certificates by the Commissioner (after final and conclusive approval by the Secretary of the Interior) instead of the General Land Office, *so far as the understanding of the Indian was concerned?*

By treaty of May 24, 1834, with the *Chickasaws* (7 Stat. 450, Kappler 418) it was provided that, "the following reservations to be granted *in fee*" to certain named individuals. "Also reservations of a section to each shall be granted to other members of the tribe." No particular individuals were named except as a class. It was held by this Court in *Best vs. Polk,* 18 Wall. 112, that this treaty resulted in the conveyance of a fee, although in the clause relating to other members of the tribe the words "in fee" were omitted, and that the term "reservation" was equivalent to an absolute grant. The broad basis for this opinion is indicated by the following language of Mr. Justice Davis:

> "In order to carry out in *good faith* Indian treaties, effect must be given to the intention of the parties to them and from the different provisions of the treaties which are applicable to this case no well founded doubt can exist of the proper construction to give to the 6th Article. * * * The Indians asked and the United States conceded to them a limited quantity of land for a permanent home. This object could not be obtained if it was meant to give them only an equitable title to the Indians. Such a title would soon become complicated by the encroachments of the white race."

The Court in this case indicates a rule, the very opposite of that contended for by the government in this case.

> "Can it be doubted that it was the intention of both parties to the treaty to clothe the reservees with full title? *If it were not so there would be some*

words of limitation indicating a contrary intention; instead of this there was nothing to show that a further grant or any additional evidence of title was contemplated."

By treaty of Oct. 1, 1859 (15 Stat. 467, Kappler 796) with the *Sac and Fox Indians* of the Mississippi, assignments of land in severalty to individuals were provided for in practically identical language to that of the treaty of 1865 with the Omahas. Later by treaty of Feb. 18, 1867, (15 Stat. 495, Kappler 951) the Sacs and Fox agreed to move from what is now the State of Kansas to Indian Territory. By the 17th Article of this latter treaty provision was made for patents in fee simple to such Kansas lands as had been assigned under these prior certificates. Said article contained a proviso that where such selections *had been sold, patents should issue to the purchasers or their assigns.* Although the tribe was to be moved out of the State such lands as had been assigned were regarded as being vested titles in the individuals. The subsequent patent in fee instead of indicating a lesser title under the certificate was but a recognition and confirmation of that title. See *Pennock vs. Commissioners,* 103 U. S. 44.

By treaty of June 24, 1862, (12 Stat. 1237, Kappler 830) with the *Ottawas* provided that for certain chiefs and head men of the tribe,

"Are reserved and set apart for that purpose to be apportioned among said chiefs, council men and head men as the members of the tribe shall in full council determine; and it shall be the duty of the Secretary of the Interior to issue patents in *fee simple.*" * * *

"Proper patents by the United States shall be issued to each individual member of the tribe and person entitled for the lands selected and allotted to them, in which it shall be stipulated that no individual, except as herein provided, to whom the same shall

> be issued, shall alienate or encumber the land allotted to him or her in any manner until they shall by the terms of this treaty become a citizen of the United States."

This latter provision did not contain the words *fee simple* or other technical words of grant. In *Libby vs. Clark,* 14 Kan. 436, Mr. Justice *Brewer* held that the terms of the section relating to patents to chiefs were to be construed the same as the section relating to assignments to the individuals and recognized that both conferred fee title, subject however to restrictions upon alienation. In the same case, 118 U. S. 250, Mr. Justice *Miller* seems also to have recognized that this treaty conferred full title on the individual whether a chief or only a member of the tribe.

Although the particular clause in the treaty with the *Chipawas* of October 2, 1863, (13 Stat. 667, 671, Kappler 853) related to lands "set apart" for certain chiefs of the tribe, there was a further provision by the 8th Article of that treaty whereby it was "agreed that the United States shall grant to each male half breed or mixed blood" certain quantities of land. Comparing the two provisions Mr. Justice Gray, *Jones v. Meehan,* 175 U. S. 1, 23, said:

> "The provisions of that article are wholly inconsistent with the theory that the title of the chiefs was to be less absolute than the title of the half breeds in their homesteads."

Thus indicating the grant of title was none the less effectual because to a specified class instead of an individual.

By treaty of Oct. 27, 1832, (7 Stat. 399, Kappler 373) with the *Pottawattamies,* the United States agreed to grant to certain members of the tribe lands to be conveyed to them by patent. By subsequent treaties of

June 5, 1846, (9 Stat. 853, Kappler 557) and Nov. 15, 1861, (12 Stat. 1191, Kappler 824), provision was made for assignments of land by certificates similar to those provided for under the treaty of 1865 with the Omahas to be issued to each member of the tribe without power of alienation. There was an additional provision not contained in the treaty of 1865 with the Omahas for "patents in fee simple *with power of alienation*" to be issued only to males and heads of families upon showing of sufficient intelligence to control their own property and upon the issuance of such patents allotees were to become citizens of the United States. On March 29, 1866, and before any allotments were made under the treaty, an amendment was made extending the provisions for patents to all adult members of the tribe. (14 Stat. 763, Kappler 916, 23 Kansas 6.) Again, by treaty of Feb. 27, 1867, (15 Stat. 531, Kappler 970) that portion of the treaty of 1861 relating to the issuance of patents with power of alienation was re-enacted with an additional provision that "the head of *the family shall be entitled to patents and the proportional share of funds belonging to his family.*" In *Doe vs. Wilson*, 23 Howard 458, 463, this Court speaking of the title conveyed by the treaty of 1832, said:

> "The reservees took by the treaty, directly from the nation, the Indian title; and this was the right to occupy, use and enjoy the lands, in common with the United States, *until partition was made in the manner prescribed.* The treaty itself converted the reserved sections into individual property. The Indians as a nation reserved no interest in the territory ceded; but as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land, *to which the United States title was either added or promised to be added;* and it matters not which, for the purposes of this controversy for possession."

Two years later in 1861, Mr. Justice *Nelson in Crews vs. Burcham,* 1 Black 352, again held that this treaty conveyed a title subject to sale and conveyance. These decisions were cited with approval by Justice *Mathews* in *Prentice vs. Stearns,* (1885) 113 U. S. 435, 446, 447, and by Mr. Justice Miller in *Prentice vs. No. Pac. R. R. Co.,* (1890) 43 Fed. 270, 275. Mr. Justice *Gray* in *Jones vs. Meehan* (1899) 175 U. S. 1, 18, said:

> "By those two decisions it was determined that the reservations created by the treaty with the Pottawattamie of October 27, 1832, in favor of individual Indians, by the words, 'the United States agreed to grant' to each of them sections of land 'which lands shall be conveyed to them by patent' had the effect of granting a present and alienable interest to each."

Notwithstanding the prior decisions of this Court it was held in *Veale vs. Maynes,* (1879) 23 Kansas 1, that the Pottawattamie treaty of 1867 could be given effect to transfer title from a patentee to the head of a family of which she was a member. The treaties of 1846 and 1861 involved in that case are somewhat distinguishable from the treaty of 1865 with the Omahas in that they contain a provision for a certificate to all of the members of the tribe and also for a patent in fee to those who satisfied certain requirements of citizenship. The decision is based partly upon the mistaken assumption that by the treaty of 1861 only males and heads of families could take patents whereas all the members of the tribe could take certificates but as already pointed out, this clause in the treaty was amended so that it offers no justification for the decision. It is submitted, however, that in view of the decisions both before and since this case to the point that in assigning land in severalty the Indian's rights are not derived directly from, and therefore consonant with the possessory rights of the *tribe,* that this case can no longer be regarded as the

law. It expressly refuses to recognize provisions for the sale of these allotments for the benefit not of the tribe, but the individual Indian. It ignores the fact that the land is for the allotee and his *heirs* to the *exclusion* of the tribe and the other members thereof. And it flies in the teeth of what is now the well settled rule of liberal construction in favor of the Indians. It was followed soon after by the same court but without much further discussion.

By treaty with the Lake Superior *Chippewas* of Sept. 30, 1854 (10 Stat. 1109, Kappler 648), it was provided that the President should from time to time at his discretion "assign to each head of a family or single persons over 21 years of age, 80 acres of land for his or her separate use." This treaty was construed in *U. S. vs. Auger*, 153 Fed. 671, to convey "full title."

The *Moses agreement* of July 7, 1883, ratified July 4, 1884 (23 Stat. 76, Kappler 1073), provided that:

> "All other Indians now living on the Columbia Reservation shall be entitled to 640 acres, or one square mile, of land to each head of a family or male adult, in the possession and ownership of which they shall be guaranteed and protected."

This Court, in *Starr vs. Long Jim*, 227 U. S. 613, held that this treaty conferred only possessory rights. It was entered into, however, after Section 2079, Revised Statutes, prohibiting the making of any treaty with the Indians, had been passed, and the decision appears to rest primarily upon that fact. Attention is called to the informal nature of that agreement and the principle of *Jones vs. Meehan* adhered to. It is submitted that if the words of a treaty are to be construed "in the sense in which they would naturally be understood by the Indians," the question is not so much by which construction would the Indians be more "*bene-*

fited," but rather what was their understanding of the rights given them by the treaty. This court "concurred in the result reached" by the Circuit Court of Appeals in 161 Fed. 613. Compare with that decision and the decision of the Supreme Court of Washington, 52 Wash. 183, the numerous decisions of the Washington courts, both before and since the case of *Starr vs. Long Jim* was there considered, cited in *Meeker vs. Kaelin,* 173 Fed. 216, 221. These same courts hold with respect to the more formal *treaty with the Puyallup* tribe that the Indian took a vested title and not a mere possessory interest *and this has become a rule of property in that state.*

The treaty of September 24, 1819, with the *Chippewas* (7 Stat. 203, Kappler 185), providing that

> "There shall be reserved for the use of each of the persons hereinafter mentioned and their *heirs,*"

but with a restriction in the patent on alienation, was construed by this Court in *Francis vs. Francis,* 203 U. S. 233, as conferring individual title. Mr. Justice *Harlan,* in the opinion in that case, said, p. 240:

> "The use of the word *heirs* clearly implies that such an estate was granted as would upon her death descend to her legal representatives. Here, then, are all the essential elements of a fee simple estate."

By treaty with the *Minnesota Chippewas* of Feb. 22, 1855 (10 Stat. 1165, Kappler 685), it was provided by section 2 that the President should within his discretion,

> "Assign to each head of a family, or single person over 21 years of age, a reasonable quantity of land, in one body, not to exceed 80 acres in anycase for his or their separate use; and he may at his discretion as the occupants thereof become capable of managing their business and affairs, issue patents to them for the tracts so assigned to them respectively; said tracts to be exempted from taxation,

levy, sale or forfeiture; and not to be alienated or leased for a longer period than two years, at one time, until otherwise provided by the Legislature of the State, in which they may be situate, with the assent of Congress. They shall not be sold or alienated in fee for a period of five years after the date of the patents; and not then without the assent of the President of the United States being first obtained. Prior to the issue of the patents, the President shall make such rules and regulations as he may deem necessary and expedient, respecting the disposition of any of said tracts in case of the death of the person or persons to whom they may be assigned, so that the same shall be secured to the families of such deceased person; and should any of the Indians to whom tracts may be assigned thereafter abandon them, the President may make such rules and regulations in relation to such abandoned tracts as in his judgment may be necessary and proper."

See *Johnson vs. Gearlds*, 234 U. S. 422, 438 also *United States vs. Oregon Central Road Co.*, 103 F. 549, 558.

A comparison of this and numerous other treaties referred to, containing similar language, in some instances containing clauses which have the effect of limiting the estate and in others having the most informal terms, but yet without any definite limitation on the title or without a definite indication that complete title was not yet intended, will indicate the full nature of the right conferred by the treaty with the Omahas of 1865. In the large majority of instances where these treaties have been construed it has been held that upon ceding their tribal lands and agreeing to adopt civilized manners and customs, the Indians thought they were to receive, and did receive, title to their lands in severalty and not merely the possessory rights which they had theretofore held in larger amounts of land.

If it be necessary to go beyond the terms of the treaty, its history and contemporaneous construction

both by the Indians and by the government shows that it effected something more than a mere temporary division of possessory rights.

History of the treaty: A judicial construction of similar treaties, many of which were entered into before this treaty, has been pointed out.

The intent of the government in entering into this treaty to definitely provide for allotment in severalty is shown from the reports of the Secretary of the Interior on the condition of the Omaha tribe for the years immediately preceding 1865. They were regarded as among the most civilized of the Indians and fully prepared for owning their own land. The annual report of the Secretary of the Interior (H. Ex. Doc. 1st Sess. 38th Cong. Vol. 3, p. 356) contains the annual report of the Superintendent of Indian Affairs at St. Joseph, Mo., dated September 4, 1863, in which he says:

> "The time has come when in my opinion the reserve should be *surveyed* and the Indians should select their homes and locate their farms *and hold them as their individual property.*"

The annual report of the Commissioner of Indian Affairs, Nov. 15, 1864, (H. Ex. Doc. 20, Sess. 38th Cong. Vol. 5, p. 180) speaks of the Omahas as being:

> "Well advanced in civilization and industrial pursuits. * * * The system of allotting lands in severalty is recommended for the Omahas, who seem to be fully prepared for it."

The report of the resident agent, Sept. 10, 1864, (p. 494) contains the following language:

> "The Omaha Indians as a tribe are well advanced in civilization and industrial pursuits * * * Over 100 are now in the Union Army. * * * Those who have enlisted all speak or understand the English language and most of them were educated at the Mission School. * * * They are peaceable, quiet, and well disposed Indians."

Report of the Commissioner of Indian Affairs, Oct. 31, 1865, (H. Ex. Doc. 39th Cong. 1st Sess. Vol. 2, p. 216):

> "Located upon an ample reservation of good land and well disposed to the pursuits of agriculture, the Indians have cultivated nearly 1,000 acres during the present year with such success as to raise enough for their own use and with a surplus for sale. * * * They have so far advanced in civilization as to begin to desire separate *allotments* of land, so they may feel the products of their industry are their own."

The report of the resident agent attached to the above report of the Commissioner makes the following pertinent observation in another connection:

> "The Indian language or character knows nothing of adjectives, 'ifs' or 'ands'; all with them is 'yes' or 'no,' the truth or a lie."

We might add that they were equally incapable of discriminating between different characters of title and that they must have understood the treaty then recently entered into as giving them the ownership of their land. Indeed the above excerpts indicate that such was the intention of the Interior Department in recommending allotment in severalty.

Other tribes no more advanced in civilization were given title to their lands in severalty at this time and prior thereto, as evidenced by the treaties already referred to. See also treaty with the Shawnee, May 10, 1854, 10 Stat. 1053, Kappler 618, 22; treaty of 1854 with the United Tribes of Kaskaskia and Peoria, Piankeshaw and Wea Indians, 10 Stat. 1082, Kappler, p. 636; treaty with the Miami of June 5, 1854, 10 Stat. 1093, Kappler 641; Kansas Indians, 5 Wall. 75; treaty with the Wyandottes, Jan. 31, 1855, 10 Stat. 1159, Kappler 677; treaty with the Ottawas, June 24, 1862, 12 Stat. 1237, Kappler

830, Libby vs. Clark, 118 U. S. 250. In the case of each of these treaties either expressly or by construction the Indian was regarded as having complete title to the land.

Understanding of the Omahas of the treaty of 1865 at the time it was entered into: When the treaty was negotiated in 1865 the Indians supposed and were in fact told by the agents of the government that upon receiving certificates they became the owners of their allotments. Some 300 made selections, went upon the land supposing it to be their own, and made improvements. The Poncas, a neighboring tribe, held their lands under treaties of March 12, 1858, 12 Stat. 997, Kappler 772, and March 10, 1865, 14 Stat. 675, Kappler 875, which made no provision whatever for a distribution of land to the individual members of the tribe. This tribe, as stated, in the brief for the United States, p. 15, was forcibly removed about 1877. The Omahas failing to appreciate the difference of their title from that of the Poncas were then induced to believe that they had not, as they supposed, received complete title to their lands under the treaty of 1865. In this attitude they were encouraged by those who disputed a further opening up of the Indian lands for settlement. Accordingly in 1882, seventeen years after the treaty of 1865, the Omahas memorialized Congress for further assurance of complete title. (See Memorial quoted on p. 16 in brief for the United States.) Attached to this memorial, however, are statements made by the several chiefs and head men of the tribe, which indicate clearly that the *contemporaneous* construction of the treaty of 1865 by the Omahas was that it gave them *complete title,* but that they were afterwards put in doubt by the removal of the Poncas. We quote from several of these statements:

"*I did think the land was mine* but now I am convinced the land is not my own."

"White men have told us that if we only occupy the land we will surely be moved as were the *Poncas.*"

"*I thought the land was my own,* so I went to work and cultivated it. Now I *find out* it is not my own and this makes me stop."

"The man who surveyed the land and the *man who gave me the certificate told me that no one could take the land from me.* * * * *I thought the certificate was a title.*"

"I have worked hard and will work hard, but *I want to be sure* the land is secured to me."

(See H. Rep. 1530, 47th Cong. 1st Sess.)

If there be any doubt as to what should be the construction of the terms of the treaty as they would naturally be understood by the Indians, it would seem to be put at rest by what appears clearly to have been the *actual understanding* of the Omahas at the time the contract between the United States and the Indians was entered into.

Departmental construction: We have pointed out what was quite apparently the intention of the Commissioner of Indian Affairs in recommending the treaty of 1865. The language of the treaty when entered into carried out completely this idea. Construed in the light of judicial holdings on other similar treaties, the department would have been warranted in issuing a fee simple patent.

The form of *certificate* actually issued, while somewhat of a departure from the terms of the treaty, clearly imports more than a mere possessory right. It declares that the United States "will hold the title thereto in trust for the exclusive use and benefit of..... and his or her heir so long as such occupancy shall continue." The treaty did not provide that the cer-

tificate should specify that the United States held the land in trust. Neither did it provide for surrender in case of a failure to occupy the land. In case of inconsistency the terms of the treaty must control. However, as an evidence of the construction put upon the treaty by the Department, the certificate indicates something more than a mere right of possession. In *Bird vs. Terry*, 129 Fed. 472, the treaty involved was identical with the earlier treaty with the Omahas of 1854. The certificate issued was practically identical with the certificate issued in the case at bar. The court in that case said of the certificate and treaty referred to as follows:

> "It is my opinion that the patent issued by the United States government to the plaintiff, George Bird, is *not* a *meaningless or deceitful document*, which conveys no estate to the grantee, and I hold that it must be regarded and construed as a *bona fide* and valid instrument, effective to fulfill the promise made to the grantee named therein as one of the Indians concerned in the treaty made by Gov. Stevens in the year 1854. By the treaty, Bird, as the head of a family, was entitled to have the quantity of land which the patent conveys allotted to him in severalty as a permanent home for himself and family, upon condition that he and the family should occupy and cultivate the same; and by the treaty he was promised not only the right to occupy and cultivate the land, but that the right should be *exclusive*, and *inheritable* by his heirs. The estate which the government promised to convey was not an absolute fee-simple estate, but was limited, so that he could not alienate the same without the consent of the state Legislature and of Congress, and the estate was defeasible in this: that it was subject to forfeiture if the allotee became a rover, and failed to occupy the land as a home. The patent by plain and positive words conveys to Bird the rights and the title which the treaty promised, and the grantee has in good faith accepted the land and the patent, and by erecting a

> dwelling upon the land and preparing a part of it for tillage, and by making his home thereon, and actual occupancy and cultivation of the land, he has fulfilled the conditions which entitle him to all the rights and benefits which the patent purports to convey to him."

As heretofore stated this case has been followed in several other cases in Washington. *Meeker vs. Kaelin*, 173 Fed. 216, 221, and cases there cited.

It does not appear that the Interior Department gave any more definite expression to its views of the title conveyed by these certificates than that indicated by the language of the certificate itself, until about the time the act of 1882, 22 Stat. 341, involved in this case was passed. At this time the Commissioner of Indian Affairs in transmitting the memorial and statements of the Omahas heretofore referred to to the Senate Committee on Indian Affairs, (H. Rep. 47th Cong. 1st Sess. No. 1530) says:

> "By the treaties with the Omahas of 1865, 14 Stat. 667, provision is made for the issuance of certificates to members of the tribe; but *it may be questionable, and it is questioned whether such certificates have the force and effect of a patent, and convey the fee of the land.* The question may be a more practicable one when the time shall arrive at which those holding the lands under such certificates *shall be entitled to and wish to sell their lands* * * * I recommend a provision for the issuance of patents 'in lieu of' the certificates provided for in the 4th article of the treaty of March 6, 1865."

This was not equivalent to a decision that the certificate represented merely a possessory right, but was rather a suggestion of a method by which it was thought Congress could avoid an invasion of prior rights, whatever they were. The same thought runs through the decision of the Secretary of the Interior in 1900 on the claim involved in the case at bar. (Brief for United

States, Appen. "D" and "E.") The conclusion of the Acting Secretary in his letter of Jan. 15th (p. 48) is:

> "The act of 1882 provided that allotments thereunder should be in lieu of the assignments made under the treaty of 1865, and the Omahas *having duly accepted* the provisions thereof, assignees under the treaty are *without recourse* except as provided in the act."

There is no evidence of anything like a judicial investigation of this question by the department, nor are its conclusions long adhered to or sufficiently clear or consistent to be controlling. The Commissioner of Indian Affairs apparently seeks to solve the difficulty arising out of these certificates outstanding at the time the act of 1882 reallotting the land was passed, *not upon the theory that the certificates represented a mere possessory right, but upon some theory of estoppel or surrender.* That was all he could do after the Act of 1882 was passed.

Moreover, in the case of an Indian treaty, rules in favor of *departmental construction,* or of a strict construction against a grantee of the government, must give way to the rule in favor of a construction of the language as it would naturally be understood by an unlettered people. *Nor. Pac. Ry. Co. vs. U. S.,* 227 U. S. 355, 356. Here the rule is just the reverse. *Choate vs. Trapp,* 224 U. S. 665, 674; *U. S. vs. Winans,* 198 U. S. 371, 380, 382; *Jones vs. Meehan,* 175 U. S. 1, 22, 23; *Francis vs. Francis,* 203 U. S. 233. This treaty was not merely an act of Congress, but a *contract,* the obligation of which is none the less binding because the government is one of the parties to the contract. None of the cases in favor of departmental construction referred to on pages 18 and 20 of the brief for the United States concerned the interpretation of an Indian treaty and the property rights *vested* thereby.

ACT OF AUG. 7, 1882, C 434, 22 STAT. 341.

Here again there are different provisions as to the character allotments in severalty. But it was to confirm and preserve prior allotments and induce further taking individually that induced the passage of the act. Not necessarily to increase the quality of the tenure.

Once the conclusion is reached that Clarissa Chase took title in fee simple under the treaty of 1865, it is undisputed that the act of Congress of 1882 could not impair or destroy that title. And it is none the less an invasion of the prior right by reason of the fact that Congress was *in doubt* as to the nature of the title conferred by these outstanding certificates.

The proviso of Section 4 of the act referred to (the whole act being set out in full in Appendix "B" of the government's brief) "that any right in severalty acquired by any Indian under existing treaties shall not be affected by this act," does however indicate an intention to preserve all existing rights of whatever nature.

The rule in favor of a subsequent declaration by Congress in passing the act of 1882 must, here again, give way to the rule in favor of the Indian and a liberal construction of this proviso in section 4 as the act of 1882 was in form a contract.

The case of *Sloan vs. U. S.*, 95 Fed. 197, 118 Fed. 283, may be said to throw some light upon a proper construction of the treaty of 1865 and the effect thereon of the subsequent act of 1882. That case involved the right to allotment of mixed bloods claiming under the act of 1882. The treaty provided that allotees should include "*half or mixed blood relatives;*" but the later act made no distinction with respect to the rights of allotment between Indians of the full blood and those of less than half blood. It was argued that in construing the act of

1882 reference should be had to the earlier terms of the treaty, which limited allotments to those of half blood but held that *as to future allotments* the terms of the act of 1882 enlarged the various classes of beneficiaries. The court however referred to the proviso in Section 4 of the act of 1882, reserving vested rights under previous treaties, saying (95 Fed. 196):

> "By the proviso therein contained, *all rights in severalty which had vested* under the previous laws *were reserved from the operation of the act, but with this exception:*
>
> "* * * Under the provisions of the previous treaties, some progress had been made in the matter of *allotments in severalty*, but it is evident that the parties in interest deemed it advisable to adopt a new basis for these allotments. The act preserves the rights that had become *vested under the previous treaties*, but with reference to *future allotments* it declares the rule that must govern both as to parties entitled to allotments and as to the amounts to be selected."

The ultimate conclusion reached by the Court in this case was not to divest by virtue of the act of 1882 any prior rights vested under the treaty as is indicated by the following conclusion of the Court, 118 Fed. 289:

> "The right to an allotment of a person coming within the terms of that act cannot be rightfully denied him simply because he could not bring himself within the terms of the treaty of 1865."

Indeed, the Court throughout recognizes what must be apparent from the history of the government's treatment with the Omahas, that this was but another attempt to induce the Indians to take land in severalty. Not so much the culminating step of a consistent and successfully carried out plan of gradually bettering the quality of the Indian's title, but simply another attempt after prior ones had for the most part failed to bring about

the abolition of the Indian tenure in common. Its terms were different but it is not because of that fact the first departure from the tenure in common expressly sought to be abolished by the treaty of 1865.

II.

IF THE COURT BELOW WAS RIGHT IN ITS INTERPRETATION OF THE TREATY OF 1865, THE DEFENDANT CANNOT BE ESTOPPED FROM CLAIMING TITLE UNDER THE TREATY GRANT TO HIS MOTHER BY REASON OF HAVING RECEIVED AN ALLOTMENT IN HIS OWN RIGHT UNDER THE ACT OF 1882.

The act of 1882 gave to each individual of the tribe *then living* an allotment in his *own right* irrespective of prior allotments under the treaty. *Sloan vs. U. S.*, 118 Fed. 283, 293. It is true that these allotments were to be held "*in lieu of* the allotments or assignments provided for in the 4th Article of the treaty," but the act does not provide for allotments in lieu of the rights of heirs to deceased Indians who received certificates, but who died before 1882. Hiram Chase holds the land here in dispute as sole heir of his mother and cannot be estopped to claim title by reason of the acceptance of an allotment under the act of 1882 in his own right.

Moreover, it is undisputed that Hiram Chase retained *open, notorious, exclusive and adverse possession* of the 40 acres of land involved in this action from the time of his mother's death in 1875 down to the time this action was brought. (See petition R. 4 and ruling of Secretary of Interior, App. "D," p. 49, of Government's brief.)

The Circuit Court of Appeals therefore did not err in ordering the bill to be dismissed without allowing the amendment setting up an estoppel as now suggested. Sufficient facts appear upon the face of the record and

from an examination of the act of 1882 (22 Stat. Chap. 434, Sec. 4, 5, 6) to indicate that such amendment would not make the defendant's answer any the less a complete defense to this action. *Mast, Foos & Co. vs. Stover Mfg. Co.*, 177 U. S. 485, 495; *Harriman vs. Northern Sec. Co.*, 197 U. S. 244, 287; *Castner vs. Coffman*, 178 U. S. 168, 183. Sec. 7711 Rev. Stat. of Neb. 1913, referred to by the Solicitor General, p. 22, provides for a reply when the trial court in its discretion is satisfied that the plaintiff has a meritorious claim or defense. The United States did not suggest this possible theory of the case in the court below though it could have done so by motion even after the case was decided.

III.

THE ALLOTMENT OF THE LAND IN QUESTION TO REUBEN WOLF UNDER THE ACT OF 1882 IS ALSO VOID AND PASSES NO TITLE TO ROSE WOLF SETTER BECAUSE AS ALLEGED IN THE ANSWER REUBEN WOLF DIED BEFORE THE APPROVAL OF THE ALLOTMENT BY THE SECRETARY OF THE INTERIOR AND BEFORE THE ISSUANCE OF THE TRUST PATENT.

The defendant's answer to which the government demurred alleged (R. 7)

> "That the said Reuben Wolf died on the 10th day of August, 1899, before the said allotment was completed and *before the approval of the said allotment by the Secretary of the Interior* as provided by the 6th Section of said act of 1882; and that the supposed trust patent issued for said land to said Reuben Wolf, deceased, was issued to him after his death, to-wit, on the 7th day of March, 1902, and *in violation of said statute of 1882.*"

Section 6 of the act of 1882 contained the proviso:

> "That the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered." 22 Stat. 342.

There is no provision for an allotment to heirs, the intent being to vest a descendible title only upon the approval of the allotments and the issuance of the trust patent. Thereupon and then only in accordance with the above quoted proviso the estate passed to the heirs. *Sloan vs. U. S.*, 118 Fed. 283, 294; *Woodbury vs. U. S.*, 170 Fed. 302, 305; *Meeker vs. Kaelin*, 173 Fed. 216, 220.

There was no special provision for a tribunal to finally determine questions relating to these allotments. At the time of the allotment to Reuben Wolf the act of February 6, 1901, c. 217 Sec. 1, 31 Stat. 760, amending act Aug. 15, 1894, c. 290, 28 Stat. 305, was in force conferring upon the Federal Courts jurisdiction of claims to Indian allotments excepting those of the five civilized tribes. These acts gave broad jurisdiction to review the action of the Interior Department in issuing patent to this land to Reuben Wolf three years after his decease. *Sloan vs. U. S.*, 95 Fed. 193, 194; 118 Fed. 283, 285; *Hy-Yu-Tse-Mil-Kin vs. Smith*, 194 U. S. 401, 413; *McKay vs. Kalyton* 204 U. S. 458. Any other construction of the acts of 1894 and 1901 would defeat its evident purpose. Nor was this jurisdiction taken away by act of June 25, 1910, 36 Stat. 855, transferring jurisdiction over heirship matters to the Interior Department. The right of the government under the act of 1882 to issue a patent to a dead man raised a question still within the jurisdiction of the Federal Courts.

The cases of *Skelton vs. Dill*, 235 U. S. 206, and *U. S. vs. Bessie Wildcat*, 244 U. S. 111, cited by the Solicitor General p. 22, dealing with the tribunals given jurisdiction over allotments to the five civilized tribes are therefore not decisive of the case at bar. Provision for allotments to heirs was specifically made in their

case, a special tribunal created to decide all questions, and these tribes were excepted from the provision of the above quoted act conferring jurisdiction on the Federal Courts.

Moreover, the Interior Department in issuing the patent to Reuben Wolf was acting under a pure *mistake of law.* The letter of the Secretary of the Interior, written July 18, 1901, indicated that the *heirs* of Reuben Wolf were then seeking allotment of this land. Appen. F, p. 49. It appears from the plaintiff's petition, (R. 3) that the trust patent was not issued until March 7, 1902, and was issued to "Reuben Wolf and to his heirs." The action of the Interior Department is therefore subject to review by the Judiciary, *irrespective of the special jurisdiction conferred* on the Federal Courts over Indian allotment cases by the acts of 1894 and 1901 cited *supra. Johnson vs. Towsley,* 13 Wall. 72, 85; *Superior Ship Canal Co. vs. Cunningham,* 155 U. S. 354, 375; *Lee vs. Johnson,* 116 U. S. 48, 49. It thus appears, that, though it be conceded for purposes of argument that the Chases had only a right of possession, that right should stand in the absence of a better right. And going upon the land with their certificate as they did it would scarcely be argued that this action is maintainable as one in trespass solely in favor of the tribe.

The plea in the 8th paragraph of defendant's answer that Reuben Wolf died before the approval of his allotment and before the issuance of the trust patent, therefore presented a defense to this action and the demurrer to the answer should have been overruled regardless of the question of the title of Hiram Chase.

CONCLUSION.

It is submitted that the treaty of 1865 conferred title to the land in controversy upon Clarissa Chase and that neither the tribe nor Congress had authority to deprive the respondent, Hiram Chase, of the title which he inherited from his mother.

The judgment of the Circuit Court of Appeals should be affirmed.

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September, 1917.

APPENDIX "A."

TREATY WITH THE OMAHA, 1865.

Articles of treaty made and concluded at Washington, D. C., on the sixth day of March, A. D. 1865, between the United States of America, by their commissioners, Clark W. Thompson, Robert W. Furnas, and the Omaha tribe of Indians, by their chiefs, E-sta-mah-za, or Joseph La Flesche; Gra-ta-mah-she, or Standing Hawk; Ga-he-ga-zhinga, or Noise; Sha-da-na-ge, or Yellow Smoke; Wastch-com-ma-nu, or Hard Walker; Pad-a-ga-he, or Fire Chief; Ta-su, or White Cow; Ma-ha-nin-ga, or No Knife.

ARTICLE 1. The Omaha tribe of Indians do hereby cede, sell, and convey to the United States a tract of land from the north side of their present reservation, defined and bounded as follows, viz: commencing at a point on the Missouri River four miles due south from the north boundary line of said reservation, thence west ten miles, thence south four miles, thence west to the western boundary line of the reservation, thence north to the northern boundary line, thence east to the Missouri River, and thence south along the river to the place of beginning; and that the said Omaha tribe of Indians will vacate and give possession of the lands ceded by this treaty immediately after its ratification: *Provided*, That nothing herein contained shall be construed to include any of the lands upon which the said Omaha tribe of Indians have now improvements, or any land or improvements belonging to, connected with, or used for the benefit of the Missouri school now in existence upon the Omaha reservation.

ARTICLE 2. In consideration of the foregoing cession, the United States agree to pay to the said Omaha tribe of Indians the sum of fifty thousand dollars, to be paid upon the ratification of this treaty, and to be expended by their agent, under the direction of the Commissioner of Indian Affairs, for goods, provisions, cattle,

horses, construction of buildings, farming implements, breaking up lands, and other improvements on their reservation.

ARTICLE 3. In further consideration of the foregoing cession, the United States agree to extend the provisions of Article 8 of the treaty between the Omaha tribe of Indians and the United States, made on the 16th day of March, A. D. 1854, for a term of ten years from and after the ratification of this treaty; and the United States further agree to pay to the said Omaha tribe of Indians, upon the ratification of this treaty, the sum of seven thousand dollars as damages in consequence of the occupancy of a portion of the Omaha reservation not hereby ceded, and use and destruction of timber by the Winnebago tribe of Indians while temporarily residing thereon.

ARTICLE 4. The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians. The lands to be so assigned, including those for the use of the agency, shall

be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. The whole of the lands assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation, within and over which all laws passed or which may be passed by Congress, regulating trade and intercourse with the Indian tribes, shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent of Indian affairs, or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him, shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale or forfeiture, until otherwise provided for by Congress.

ARTICLE 5. It being understood that the object of the Government in purchasing the land herein described is for the purpose of locating the Winnebago tribe thereon, now, therefore, should their location there prove detrimental to the peace, quiet, and harmony of the whites, as well as of the two tribes of Indians, then the Omahas shall have the privilege of repurchasing the land herein ceded upon the same terms they now sell.

In testimony whereof, the said Clark W. Thompson and Robert W. Furnas, Commissioners as aforesaid, and

the said chiefs and delegates of the Omaha tribe of Indians, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

CLARK W. THOMPSON,
R. W. FURNAS,
Commissioners.

E-STA-MAH-ZHA, or JOSEPH LAFLESCHE, his X mark. (Seal)
GRA-TA-MAH-ZHE, or STANDING HAWK, his X mark. (Seal)
GA-HE-GA-ZHIN-GA, or LITTLE CHIEF, his X mark. (Seal)
TAH-WAH-GA-HA, or VILLAGE MAKER, his X mark. (Seal)
WAH-NO-KE-GA, or NOISE, his X mark. (Seal)
SHA-DA-NA-GE, or YELLOW SMOKE, his X mark. (Seal)
WASTCH-COM-MA-NU, or HARD WALKER, his X mark. (Seal)
PAD-A-GA-HE, or FIRE CHIEF, his X mark. (Seal)
TA-SU, or WHITE COW, his X mark. (Seal)
MA-HA-NIN-GA, or NO KNIFE, his X mark. (Seal)

In presence of:

H. CHASE, *United States Interpreter.*
LEWIS SAUNSOCI, *Interpreter.*
ST. A. D. BALCOMBE, *United States Indian Agent.*
GEORGE N. PROPPER.
J. N. H. PATRICK.

IN THE

SUPREME COURT

OF THE

UNITED STATES

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN OF THE OMAHA TRIBE OF INDIANS AND OF ROSE WOLF CUTTER, A MEMBER OF SAID TRIBE, PETITIONER

vs.

SUSAN CHASE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR A. P. ANDERSON, APPEARING AMICUS CURIAE

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IN THE

SUPREME COURT

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UNITED STATES

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN OF THE OMAHA TRIBE OF INDIANS AND OF ROSE WOLF SETTER, A MEMBER OF SAID TRIBE, PETITIONER

VS.

HIRAM CHASE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF O. C. ANDERSON, APPEARING AMICUS CURIAE.

STATEMENT OF FACTS.

The facts in this case have been fully set out in the various briefs filed herein and we will not take up the time of the court reiterating the same, but will confine ourselves to a statement of the history and law involved in the various treaties and acts of Congress relative to the lands of the Omaha Tribe of Indians, and which we think control and decide this case.

ARGUMENT.

In this action the Circuit Court of Appeals held:

> "The Treaty with the Omaha Tribe of Indians of March 6, 1865 (14 Stat. 667, 2 Kappler 872), granted to assignees of land in severalty thereunder an inheritable

> title in fee simple to their respective tracts, subject to a restriction on alienation to others than the United States and other members of the tribe."

In this we think the Circuit Court of Appeals erred. It seems to have arrived at this decision by taking the words of the treaty itself into consideration and without having given due consideration to the intention of the United States and the Indians themselves as to the meaning of this treaty.

In order that we may understand this particular treaty, it is necessary to review the various treaties and acts of Congress relative to this tribe of Indians and these particular tracts of land, and also review the various treaties and acts of Congress relative to the Plains Tribes of Indians entered into by the United States and these tribes of Indians at or about the time it made these negotiations with the Omaha Tribe of Indians.

History of the policy of the United States of America in establishing the various tribes of Indians, including the Omaha Tribe, upon reservations, and giving them possession in common of their lands.

The first treaty which bears upon the Omaha Tribe of Indians and upon these lands in question is that of 1854 (10 Stat. 1043, 2 Kappler, 611). By this treaty the Omaha Tribe of Indians ceded to the United States certain lands in the southeastern part of the state of Nebraska, of which it claimed right of possession, for the possession of certain lands in the northeastern part of the state of Nebraska, where the said tribe of Indians are now located, and being the lands involved in said Treaty of 1865, now in question. About the time the aforesaid Treaty of 1854 was entered into by the United States and these Indians, said treaty was a part of a general policy of the United States in making treaties with the various Plains Tribal Indians. The United States was entering into treaties with these various Plains Tribal Indians, including the Omaha Tribe of Indians, in order to get said

tribes established on fixed reservations. All of these treaties were similarly worded and all had the one object in view, namely to get these various tribes of Indians established on reservations and thereby be able to handle and control them better than by allowing them to roam at large over the country in general without any fixed habitation. These treaties were the first step taken by the Government of a general policy to educate these various tribes of Indians for citizenship which was ultimately granted to these tribes.

The treaties with the following tribes were all treaties locating these Indians upon reservations:

Delawares, May 6, 1854-10 (10 Stat. 1048, 2 Kappler 614).

Pottawattomi, June 5 and 17, 1846 (9 Stat. 853, 2 Kappler 557).

Omaha, March 16, 1854 (10 Stat. 1043, 2 Kappler 611).

Otoe and Missouri, March 15, 1854 (10 Stat. 1038, 2 Kappler 608).

Arapahoe and Cheyenne, September 17, 1851 (11 Stat. 749, 2 Kappler 594).

Kickapoo, May 18, 1854 (10 Stat. 1078, 2 Kappler 634).

Nez Perces, June 11, 1855 (11 Stat. 957, 2 Kappler 702).

Chippewa, September 30, 1854 (10 Stat. 1109, 2 Kappler 648).

After the United States had established the Omaha Tribe of Indians on this reservation under the aforesaid Treaty of 1854 and after it had established various other tribes of Plains Indians on reservations under similar treaties and after these various tribes of Indians had remained on these reservations under these various treaties for a number of years, the United States then thought it advisable to take one more forward

step for the advancement of these Indians toward citizenship and habits of fixed industry. The United States found when it limited these Indians to certain reservations it had limited the opportunity of the Indians to support and maintain themselves. Before the Indians were confined to reservations they maintained themselves by hunting, fishing, etc. They knew but little about agriculture and supporting themselves in that manner. Before they were limited to reservations they could hunt and fish wherever they wished to, but when they were confined to reservations the Indians found they could not maintain themselves solely by hunting and fishing as they had done before, and that it was necessary to do more farming and agriculture, and in order to do this kind of work satisfactorily it would be advisable to have fixed places of abode. The land under the reservation system was all held in common as tribal property and these Indians were more or less confused as to what tracts of land they could farm and could not farm, and their farming was done more or less on the tribal order and community affair than it was by individuals.

History of the policy of the United States of America, in enlarging the rights of Indians on reservation by abolishing tenure in common of possession, and giving to each family possession of a definite tract of land.

In order to overcome this difficulty caused by possession of land in common, the United States entered upon a new policy with reference to the Omaha's as well as all the tribes of the Plains Indians. After various investigations of the Omaha and other Plains Indians it decided that the next step to take with the Plains Indians who had been placed on reservations was to give the various families of the various tribes possession of definite tracts of land so that the families could have the use and occupancy of definite and fixed pieces of land which they could farm and use for the purpose of maintaining themselves. With this end in view the United States entered into the aforesaid Treaty of March 6, 1865 (10 Stat. 667, 2 Kappler 872) with the Omaha Tribe of Indians.

The United States, at or about the same time also entered into similar treaties with various other tribes, namely:—

Delawares, May 30, 1860 (12 Stat. 1129, 2 Kappler 803).

Pottawattomi, November 15, 1861 (12 Stat. 1191, 2 Kappler 824).

Sauk and Foxes, October 1, 1859 (15 Stat. 467, 2 Kappler 796).

Kansas Tribe, October 5, 1859 (12 Stat. 1111, 2 Kappler 800).

Arapahoe and Cheyenne, February 18 1861 (12 Stat. 1163, 2 Kappler 807).

Kickapoo, June 28, 1864 (13 Stat. 623, 2 Kappler 835).

Nez Perces, June 9, 1863 (14 Stat. 647, 2 Kappler 843).

Chippewa, March 19, 1867 (16 Stat. 719, 2 Kappler 974).

Santee Sioux, February 19, 1867 (15 Stat. 505, 2 Kappler 956).

Numerous other treaties might be cited, but the above are sufficient to show that at or about the time these various treaties were made the United States had adopted a different policy with reference to the Plains Tribes of Indians than that under previous treaties with the same tribes during the years 1846 to 1854.

All these treaties contain a provision for assigning different tracts of land to certain persons which provisions are in many of these treaties identical, word for word, with the aforesaid treaty of March 6, 1865 (10 Stat. 667, 2 Kappler 872) with the Omaha Tribe of Indians, as to the conveying and assigning of said lands.

All that the Treaty of 1865 with the Omahas and the various other treaties that the United States entered into at this time with the various other Plains Tribes of Indians amount-

ed to, was to change the right of occupancy and possession of certain tracts of land from the tribe to the individual in order that the individual Indian could maintain himself and family in their respective reservations. The occupancy of all the other lands held in the respective reservations was held in common and as tribal property. The United States had no thought of parting with its fee title to any of these lands in these various treaties with these different tribes of Indians at this time.

History of policy of the United States of America, in granting citizenship to Indians, in allotting the tribal lands to individuals with fee in United States, and to be held in trust by the United States.

This policy of the United States of permitting the Indians to occupy and use certain tracts of land within their respective reservations continued until about the year 1882, when the United States decided that these various Indians in many of these tribes were ready for another advanced step, were ready to dissolve their tribal relations, were ready and fitted to become citizens and were competent to control their lands on their respective reservations.

In accordance with this policy the United States on August 7, 1882 (22 Stat. 341, 1 Kappler 213) entered into a new agreement with the Omaha Tribe of Indians and alloted in severalty definite tracts of land to certain Indians and granted citizenship to all such Indians who accepted allotments and severed their tribal relations.

It will be observed that this act of Congress was requested and petitioned for by the Omaha Tribe of Indians as a tribe and the act was not to go into effect until ratified by the Omaha Tribe of Indians, which consent was given by the tribe on May 5, 1883. Had the United States or the Omaha Indians thought that the certificates issued under the aforesaid Treaty of 1865 conveyed a title in fee to the assignees thereof, then the holders of these certificates would have

dealt individually with the United States with respect to their individual tracts of land which had been assigned to them under the aforesaid treaty and the tribe would not have undertaken to deal with the same. This indicates that the United States and these Indians did not consider that these lands were held in fee simple by the Indians, but on the contrary they thought the title in fee was still in the United States and all that the Indians owned was the right of occupancy, being the title which they held as a tribe under the Treaty of 1854 and a right which they held as individuals under the Treaty of 1865.

About this time when the United States took this new step of allotting lands in severalty with restrictions on alienation and granting citizenship to the Omaha Indians, it entered into agreements or passed acts similar to the aforesaid Act of August 7, 1882, with the Omaha's, with various other Plains Tribal Indians. The essential parts of all these acts with reference to the title to the lands being held in trust by the United States for these various tribes of Indians upon these several reservations are almost the same, word for word, as the aforesaid Act of Congress of 1882 relating to the Omaha Tribe of Indians.

Otoe and Missouri, March 3, 1881 (21 Stat. 320).

Sauk and Foxes, March 3, 1885 (25 Stat. 351), and February 13, 1891 (26 Stat. 749).

Arapahoe and Cheyenne, March 3, 1891 (26 Stat. 989).

Kickapoo, March 3, 1893 (27 Stat. 557).

Nez Perces, May 1, 1893 (28 Stat. 327).

Chippewa, January 14, 1889 (25 Stat. 642).

Santee Sioux, March 2, 1889 (25 Stat. 888).

General Allotment Act of February 8, 1887 (24 Stat. 388).

From the foregoing history of legislation with reference to the Plains Indians and their lands, we find the United States about the year 1854, inaugurated the policy of con-

fining these various tribes of Indians on definite and fixed reservations. Under this policy the United States held the fee title and the only interest the Indians had in the land was that of possession and occupancy as a tribe. The United States continued this policy until about the year 1862 when it made an advance step in this policy by entering into new treaties with these various Indian tribes of the plains, giving the individual Indian or family the occupancy and possession of certain definite tracts of land, but still retaining the fee title and control over the land. It adopted this new policy because it thought by getting the individual Indians to settle on fixed and definite tracts of land they would cease their roaming about the country and would thereby cultivate habits of fixed industry and would in time abolish their tribal relations and be ready for citizenship. These various treaties and acts of Congress relating to these various tribes are all similar to the aforesaid Treaty of 1865 with the Omahas showing that it was a new departure for the United States and that the United States had no intention of parting with its fee title in the lands held by these various tribes of Indians, but it was waiting for further developments on the part of the Indians before parting with the fee title or to the control over the land itself.

This policy of the United States continued until about the year 1882 when the United States decided these Indians had advanced sufficiently in habits of industry and in fixed habits of living and education to entitle them to become citizens and to have fixed and definite rights in certain tracts of land in their respective reservations, and the aforesaid Act of August 7, 1882 (22 Stat. 341) with the Omaha Tribe of Indians and the several acts of Congress with the various other tribes of Indians above referred to had conferred citizenship upon these Indians and did give them certain rights in certain lands in their respective reservations which were greater and which were more fixed and definite than the rights of the individual under the Treaty of 1865 and similar

treaties with other tribes entered into about that time. But even under the policy of 1882 allotting these lands in severalty to the Omaha Indians and various other acts of Congress relating to other Indians, the United States did not give the fee title to the lands to the Indians, and the United States has not to this day seen fit to grant the fee title to these lands to these Indians in these various tribes, except under subsequent acts of Congress whereby the Secretary of the Interior upon investigation, if he is satisfied an Indian who holds a trust patent of allotment is competent and if he deems it advisable, he may issue a patent in fee to said Indian for his allotment. But there is no act of Congress whereby the Omaha Indians or these various other tribes of Indians can legally demand a patent in fee for his land held in trust. The United States still deems it expedient to hold the fee title to these various Indian lands.

When the history of the legislation with reference to these Indians and their lands is investigated, it does not seem possible that the United States intended to convey to the individual Omaha Indians the fee title to the land assigned under the Treaty of 1865, or that these Indians thought they were getting a fee simple title. All the acts of the United States and the Indians themselves with reference to these lands, and the history connected with the same, show that none of the parties to the contract held such an idea, and that none of the tribes ever thought they were getting a fee simple title; and that the only title which the United States contemplated giving or intended to give, and the only title which the Indians thought they were getting, was that of the right of occupancy and possession to the land assigned to them under the certificate.

The Indian title is a mere possessory title, the fee title remaining in the United States.

Keeping this legislative history in reference to these Indians and these lands in mind, let us examine the law governing such matters.

It is a well settled rule of law in the United States that the Indian title is a mere possessory title, the fee in the soil remaining in the United States.

Holden v. *Joy*, 17 Wall. 211.
Stoother v. *Murphy*, 1 Murphy (N. C.) 168.
Fletcher v. *Peck*, 6 Cranch. 142.
Johnson v. *McIntosh*, 8 Wheat. 543.
Beecher v. *Weatherby*, 95 U. S. 517.
Henderson v. *Poindexter*, 12 Wheat. 535.
Cherokee Nation v. *Georgia*, 5 Pets. 1.
Worchester v. *Georgia*, 6 Pets. 515.
Mitchell v. *U. S.*, 9 Pets. 711.
U. S. v. *Rogers*, "4" Howard 567.
The Cherokee Trust Funds Con., 117 U. S. 288.
Breaux v. *Johns*, 50 Am. Dec. 555.
State v. *Towcssnute*, 154 Pac. 805.
Spalding v. *Chandler*, 160 U. S. 194.
U. S. v. *Cook*, 19 Wall. 591.
U. S. v. *Four Bottles Sour Mash Whiskey*, 90 Fed. 720.
Williams v. *City of Chicago*, 37 S. Ct. 142.

Unless there is a clear and explicit provision in the treaty showing the United States intended to make a grant in fee simple, the court will not presume that a new departure from the policy in the past was intended.

It is the rule of law with respect to the Indians' title being only a right of occupancy, the fee remaining in the United States, that unless there is a clear and explicit provision in the treaty showing that the Government intended to make a grant in fee simple, the court will not presume that a new departure from the policy pursued in the past was intended.

Good Fellow v. *Muckey*, 1 McCreary 288.
Beecher v. *Weatherby*, 95 U. S. 525.

Treaties must be construed as contracting parties understood same at time agreement was made, taking into consideration the status of the contracting parties.

It is the rule of law that in construing a treaty between the United States and an Indian Tribe, the treaty must be construed not according to the technical meaning of its words to the learned lawyer or the technical meaning of its words as between citizens of the United States, but on the contrary, the words in a treaty should be construed in the light of the recognized relations between the Government and the Indian and the established policy of the former towards the latter, and as the Indians and the United States must have understood the treaty at the time it was made, regardless of technical meaning of the words.

Kansas Indians, 5 Wall. 737.
Choke v. *Trapp*, 224 U. S. 665.
Shulthis v. *McDougal*, 162 Fed. 331, 170 Fed. 529.
Jones v. *Meehan*, 175 U. S. 1.
Veal v. *Maynes*, 23 Kan. 1.
U. S. v. *Payne*, 8 Fed. 883.

Grants and restrictions claimed under Indian treaties are strictly construed against the grantee and beneficiary.

Jones v. *Meehan*, 175 U. S. 1.
Doe v. *Wilson*, 23 Howard 457.

The title of the Five Civilized Tribes to their lands is different than that of the Plains Indians, and the rules of law governing same are different.

The foregoing rules of law apply to the original or Plains Tribes of Indians, and does not apply to the Five Civilized Tribes. The Five Civilized Tribes acquired their present land by treaties or agreements with the United States, in each instance followed by a patent executed in due form granting to the tribes, for the members thereof, the lands described therein, to be held in fee simple but upon condition subsequent, the grant being usually limited as follows:

> "To have and to hold the same unto the said Tribe of Indians as long as they shall exist as a nation and continue to occupy the same."

Each of the Five Civilized Tribes continued to exist as a nation and to occupy the lands thus patented until subsequent agreements were entered into by which they were allotted to the members of the tribes. The Five Civilized Tribes at the beginning of the process of allotment had secured from the United States the fee to the lands they occupied and had merged the right of occupancy into the fee. The tribal lands of the Five Civilized Tribes, the manner of allotting the same, the title secured by the allottee, the manner in which title is passed, and the right to alienate are concerned, are all dependent upon laws enacted with special reference to one or more of these tribes, which have no general application to other Tribal or Plains Tribal Indians.

Buster and Jones v. *Wright*, 135 Fed. 947.
Maxey v. *Wright*, 5 S. W. 807.
Weimer v. *Zevelly*, 138 Fed. 1006.
Ex parte Carter, 76 S. W. 102.
Forsythe v. *United States*, 64 S. W. 548.

This distinction between the ordinary tribal title or Plains Indians Tribal title as construed and considered by the courts, and the title by which the Five Civilized Tribes held their lands is material in the consideration of the authority of the United States and of the rights possessed by the members of the tribe prior to allotment and to the process necessary to invest each allottee with a fee title to the lands selected by him in allotment.

By reason of this distinction and difference between the title to lands held by the ordinary or Plains Tribal Indians and the title held by the Five Civilized Tribes, the cases cited from courts construing the title to lands held by members of the Five Civilized Tribes are not in point in the case at bar.

Under Treaty of March 16, 1854 (10 Stat. 1043, 2 Kappler 1611), the only title Omaha Indians had in said lands was that of occupancy as a tribe. Fee title remained in United States.

In view of the foregoing principles of law applicable to the Indians and Indian treaties, let us examine the aforesaid Treaty of March 6, 1865 (10 Stat. 567, 2 Kappler 1872), with the Omaha Tribe of Indians and also the Treaty of March 16, 1854 (10 Stat. 1043, 2 Kappler 611). The starting point in respect to the Omaha Tribe with reference to these lands is the Treaty of 1854, whereby the Omaha Indians were located upon their present reservation, being the same reservation included in the aforesaid Treaty of 1865. Under the Treaty of 1854 it is conceded that the only title the Indians had in the lands in said reservation was that of occupancy as a tribe. The tribe held the right of occupancy in common and lived upon the reservation as a tribe and was governed in all its affairs under the tribal law and custom.

Under Treaty of March 6, 1865 (10 Stat. 567, 2 Kappler 872), possession in common as a tribe was abolished, and possession to definite tracts of land was granted to individuals and the United States still held fee title.

The aforesaid Treaty of 1865 was simply an extension of the Treaty of 1854, whereby the tribe sold a part of its reservation to the Winnebago Tribe of Indians and, as hereinbefore stated, to give the individual Indian additional rights for the purpose of enabling him to maintain himself and family on the reservation and for the purpose of beginning to prepare him for citizenship. The very language of Article 4 of the Treaty of 1865 shows that the only title the Indians had was that of possession, and the only change intended was that of possession in common to that of possession by individual. The first seven lines of Article 4 read as follows:

> "The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities

> thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, etc."

What tenure in common did the United States and the Indians by this treaty intend to abolish? They say in this treaty that they intend to abolish the tenure in common by which the Indians now hold these lands. They were holding these lands under and by virtue of the Treaty of 1854, and under this treaty the only title these Indians had to this land was that of occupancy or possession as a tribe. The title in fee was still in the United States and the only tenure in common the Indians had was that of possession or occupancy and it was this tenure in common they wished to abolish. It was this tenure that the United States consented to abolish. Under this treaty the fee title was in no manner changed or interfered with. The Indians wished to abolish this title of possession in common as a tribe and have assigned to them in lieu thereof possession of certain definite tracts of land to each individual for his individual use and benefit. In view of the history and condition surrounding these Indians at the time the aforesaid Treaty of 1865 was made, is the only rational and reasonable interpretation to place upon this treaty.

Stress is laid upon the following clause of Article 4 of said Treaty of 1865 by the defendant, and also by the court of appeals, as showing that an inheritable interest in the fee title was intended:

> "Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale or forfeiture, until otherwise provided for by Congress."

If this provision in this section stood by itself in this treaty, there might be some force to this contention or proposition, but when you read this provision in connection with the remainder of the treaty and with reference to the legislative history leading up to the enactment of this treaty, it will not bear this interpretation, and said interpretation is not the correct one to apply to this treaty.

The expression "that they are for the exclusive use and benefit, etc.," refers to the right of possession or occupancy of the tract of land called for in the certificate, being the right conveyed by the certificate and being the title intended to be conveyed by this treaty in its conveying clause in the forepart of said Article 4. It is the right of possession which should be for the use and benefit of themselves, their heirs and descendants. This interpretation is in harmony with the policy of the United States, that these Indians should have the use and possession of these lands and upon the death of the Indian his family and heirs should continue to have the possession of the same. It was the right of possession and occupancy that was to be inheritable and not the fee title.

Stress is also laid upon the words: "Severalty, heirs and descendants, etc.," used in this treaty, but when such words are used in connection with the wording of the treaty, they simply refer to the right, use and occupancy of the land assigned to them and not to the fee title.

Words of perpetuity and heirship have been used by the United States in various treaties with Indians whereby the whole world has been notified that the land so set apart was to be held, owned and occupied by the Indians and yet it has always been well understood that the Indian title is a mere right of occupancy and possession with the ultimate fee resting in the United States.

In the case of *Beecher* v. *Weatherby*, *supra*, the court held that even though the treaty provided that the lands shall be owned and occupied by the Indians "and was set apart for

their future home," the same only conveyed a possessory right. To the same effect see *United States* v. *Cook*, 19 Wall 591.

The Osage reservation for instance was set apart for that tribe by the most solemn words of perpetual ownership, yet the supreme court said in the case of *Leavenworth L. & Gr. Co.* v. *United States*, 92 U. S. 733: "In the free exercise of their choice, they might hold it forever." But they only hold it. The fee was in the United States subject to the rights of possession by the Indian. That the Government had power to depart from this tradition and policy and vest the fee as well as the right of occupancy in the Indians is not questioned. But if a departure had been intended words more apt and clear would undoubtedly have been used.

So in the case at bar, under the aforesaid Treaty of 1865, the parties to the same could have provided for a division of the land among the Indians which would have vested absolute title in fee in each Indian beyond the power of the tribe or the government to disturb, without the personal consent of the individual, to whom land had been assigned, or they might have provided for an individualizing of the right of occupancy, giving to each person and his heirs a sole right of occupancy in a particular tract, but still within the power of the tribe as a tribe to convey by treaty as they did in Treaty of 1865.

In other words, while these lands remained the tribal home, each individual desiring it should have a separate control over certain lands made subject to the ultimate power of the tribe to change its home and to make absolute conveyance of the whole body of the lands. Under said Treaty of 1865 the power of the tribe as a tribe remained undisturbed over both the assigned and unassigned lands. The assignee remained a member of the tribe and only a few of the members of the tribe were assigned land under this treaty and continued to live upon the same. As a matter of fact, the Indians still lived under their tribal customs and the Indians to whom certificates of assignment had been issued continued to live upon the unassigned lands under tribal custom, the same

as the Indians who had not received certificates of assignment. The tribe still retained jurisdiction over the assigned lands as well as the unassigned lands for the purpose of negotiating with the United States in regard to the same. The Indians who held certificates of assignment were members of the tribe and took part in these tribal affairs. There was no separation of the assignee under the certificates from the nation or tribe and no expressed restriction upon the tribal powers to act for him as fully as they did for members of the tribe who did not receive certificates.

If the intention of the parties to this treaty had been to change the title of the Indian from the ordinary Indian title of possession or occupancy to that of fee simple title or an inheritable title in the fee, the intention would have been expressed in unmistakable terms. If, on the other hand, a difference was to be made in the mere manner in which the various Indians should occupy the tribal home or lands, it was enough that that difference was made clear and language used to indicate that should not be enlarged to mean a fee title.

The history and policy of the United States, the language used, and the conditions existing at the time this Treaty of 1865 was made, all indicate that the only title intended to be conveyed by the certificate was that of occupancy, and this notwithstanding the many expressions employed, which, if used in ordinary contracts between white citizens might perhaps if used in their technical sense tend strongly to a different meaning.

We find the tribal relations under the Treaty of 1865, were left intact and fully recognized. The treaty provided:

> "The whole of the lands, assigned or unassigned in severalty, shall constitute and be known as the Omaha Reservation, within and over which all laws passed or which may be passed by Congress regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to

reside or go upon any portion of said reservation without the written permission of the Superintendent of Indian Affairs or the Agent for the tribe."

These provisions clearly show the United States only intended to give the Indian the right of possession of the lands. If the individual Indians under these certificates had a fee title and an inheritable fee in the title, the United States could have no authority whatever to regulate who should go upon the land or who should reside upon the same. If the United States intended to give these Indians a fee title and also possession of the land it would not be interested in holding control and passing laws governing these lands. If a fee title was given to the Indians, the courts would protect the individual Indian in his title.

The Act of August 7, 1882 (22 Stat. 341, 1 Kappler 213), suspended all prior acts and treaties with the Omaha Tribe of Indians on the subject and all subsequent allotments are governed solely by its provisions and the amendatory acts thereto.

The tribal relation under the Treaty of 1865, was left intact and fully recognized, and the United States and the tribe acting for the Indians had full power to act with reference to these lands assigned under these certificates, and with this idea in mind the United States and the Indians as a tribe entered into negotiations in regard to these lands which resulted in the Act of Congress of August 7, 1882 (22 Stat. 341). In negotiating for this act the United States dealt direct with the duly constituted authorities of the Omaha tribe of Indians.

The Omaha tribe of Indians petitioned for this act and the act itself after being passed by Congress was ratified by the Omaha tribe of Indians.

In this Act of 1882, we find the same contracting parties as those of the Treaty of 1865. It is a well settled rule of law and needs no citation of authorities that where contracts are entered into between the same parties, the construction placed by the parties themselves in the latter contract upon the pro-

visions of the earlier one is strong evidence of their scope and effect. Except in so far as adverse and vested rights are concerned, it might be said to be controlling. The aforesaid Act of 1882 is with the Omaha tribe as a tribe, and concerns and deals with the assigned and unassigned lands, under the Treaty of 1865. The dealings with reference to the Act of 1882 are not separately with each assignee for his tract and with those holding in common who were not assigned lands under the Treaty of 1865, but with the tribe as a whole and for all the lands upon the reservation, assigned and unassigned. The very manner of dealing with reference to this reservation and these lands show that the parties thereto did not understand that the Treaty of 1865 placed the assigned lands any more than the unassigned lands outside of the limits of the jurisdiction of the tribal control.

The Court of Appeals held that section 4 of the Act of 1882 which provides: "That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act," referred to and means these lands assigned under the Treaty of 1865. In this the Circuit Court of Appeals was clearly mistaken, as section 5 of the Act of 1882 makes special provision with reference to said certificates of assignment in words and figures as follows:

> "Provided, that any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article (Treaty 1865) and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section."

Section 4 of the aforesaid Act of 1882, therefore, has no reference to said assignments of certificates under the ~~Act~~ treaty of 1865. It simply refers to lands which may have been granted in fee to various Indians at various times under various

treaties. Similar provisions were usually placed in all treaties with reference to Indians when the question of allotments were made with respect to their lands, as in many cases the Indians and the United States had donated certain interests in lands to chiefs and others, which rights were vested and which all the contracting parties recognized as being vested interests.

The contracting parties could not have intended section 4 of said act to refer to certificates of assignment under the Treaty of 1865, as section 5 of said Act of 1882 provides what shall be done with reference to these lands to which certificates of assignment were made. The language and construction of the Act of 1882, would certainly indicate that said section 4 refers to something else besides the certificates of assignment under the Treaty of 1865; otherwise the contracting parties would not have made special provision with reference to the certificates issued under the Treaty of 1865. The Act of 1882 shows conclusively that the United States and the Indians considered that the Treaty of 1865 gave the Indians only the title of occupancy or possession.

Furthermore, the acts of the United States in issuing these certificates of assignment under the Treaty of 1865 show all the parties to the treaty considered the only title the Indians had to the land was that of possession or occupancy. The certificate issued to Mrs. Hiram Chase, in the case at bar, is a true copy of all the certificates issued thereunder except as to name of allottee and description of land, which certificate is in words and figures as follows:

> "256 Deal Department of the Interior.
>
> "Office of Indian Affairs, Mch 17, 1871.
>
> "This is to certify that Mrs. Hiram Chase, a member of the Omaha Tribe of Indians, having expressed a desire to adopt habits of settled industry and to receive an allotment of land for the purpose of cultivation as provided in the 4th Art. of the Treaty with said tribe of Indians concluded Mch 6, 1865, is entitled to 160 acres of land and that she has selected the South East Quarter of

Section 25, Township 26 North, Range 9 East of the 6th P. M., in Nebraska.

"That said allottee is entitled to and may take immediate possession of said land and occupy same and the United States guarantees such possession and will hold the title thereto in trust for the exclusive use and benefit of herself and her heirs so long as such occupancy shall continue.

"This certificate is not assignable except to the United States or to members of the tribe under such rules and regulations as may hereafter be prescribed by the Secretary of the Interior and said allottee is expressly prohibited from assigning or attempting to assign the same, from selling or transferring the land, or disposing of the same or any interest therein to any person or persons whomsoever except as above named in penalty of entire forfeiture thereof.

"E. S. PARKER, *Commissioner.*"

This certificate conveys nothing but a right of possession and does not convey a fee title. It is a deliberate act of the department of the interior carrying out and construing the provisions of the Treaty of 1865, which it negotiated with these same Indians and shows conclusively the idea and understanding the United States had as to what title was conveyed by these assignments under the Treaty of 1865.

The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.

U. S. v. *Moore*, 95 U. S. 760.
Hastings & C. R. v. *Whitney*, 132 U. S. 357-366.
U. S. v. *Winona, etc.*, 32 U. S. App. 296.
Edward's Lessee v. *Darby*, 12 Wheat. 210.
Smyth v. *Fiske*, 22 Wall. 374.
U. S. v. *Pugh*, 99 U. S. 265.
Hahn v. *U. S.*, 107 U. S. 402.
The Five Per Cent Cases, 110 U. S. 471.
Brown v. *U. S.*, 113 U. S. 570.
Peabody v. *Stark*, 16 Wall. 240.

U. S. v. *Hill*, 120 U. S. 169.

U. S. v. *Johnson*, 124 U. S. 236.

Schell's Executors v. *Fauche*, 138 U. S. 562.

U. S. v. *Winona Railway Co.*, 32 U. S. App. 274.

Crossett v. *Townsend*, 86 Fed. 908.

J. D. Peters, 56 U. S. App. 713.

U. S. v. *Dean Linseed Oil Co.*, 57 U. S. App. 716.

We find upon investigation that wherever the courts have been called upon to interpret treaties with tribes of Indians, which are similar to the Treaty of 1865 with the Omaha tribe of Indians, they have invariably held such treaties conveyed no other or greater title to the Indians than that of occupancy or possession with the ultimate title in the United States.

The treaty, heretofore referred to, of May 30, 1860 (12 Stat. 1129, 2 Kappler, 803) with the Delawares, is as follows:

"Part of Article 1. * * * The Delawares having represented to the Government that it is their wish that a portion of the lands surveyed for their home may be divided among them in the manner contemplated by the 11th Article of the Treaty aforesaid, it is hereby agreed by the parties hereto that the said reservation shall be surveyed as early as practicable after the ratification of these articles of agreement and convention, in the same manner that the public lands are surveyed; and to each member of the Delaware Tribe there shall be assigned a tract of land containing eighty acres, to include in every case, as far as practicable, a reasonable portion of timber, to be selected according to the legal sub-division of survey.

"Art. 2. The division and assignment in severalty among the Delawares of the land shall be in a compact body, under the direction of the Secretary of the Interior, and his decision of all questions arising thereupon shall be final and conclusive.

"Certificates shall be issued by the Commissioner of Indian Affairs, for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned respectively and that the said tracts are

set apart for the exclusive use and benefit of the assignees and their heirs.

"And said tracts shall not be alienated in fee, leased or otherwise disposed of except to the United States or to other members of the Delaware Tribe, and under such rules and regulations as may be prescribed by the Secretary of the Interior; and said tracts shall be exempt from levy, taxation, sale or forfeiture until otherwise provided by Congress.

"Prior to the issue of the certificates aforesaid the Secretary of the Interior shall make such rules and regulations as he may deem necessary or expedient, restricting the disposition of any of said tracts in case of the death of the person or persons to whom they may be assigned, so that the same shall be secured to the families of such deceased persons, and should any of the Indians to whom tracts shall be assigned abandon them, the Secretary may take such action in relations to the proper disposition thereof as in his judgment may be necessary and proper."

The Supreme Court of Kansas in the case of *Ginter* v. *Kansas Pacific Railway* Co., 22 Kan. 642, in construing the aforesaid Treaty of 1860 with the Delawares stated there was nothing in said treaty to indicate that any more right or title was ganted to the allottees or grantees than that of occupancy with the ultimate fee of the land in the United States.

The Treaties of June 5 and 17, 1846 (9 Stat. 853), and of November 15, 1861 (12th Stat. 1191, 2 Kappler 824), with the Pottawattomi Indians are quite similar to the aforesaid Treaties of 1854 and 1865 with the Omaha Indians. The words used in these treaties to characterize the estate granted to the Pottawattomi in the aforesaid Treaty of 1861, were certainly as strong if not stronger to grant a fee title than any of like import used in the Omaha Treaty of 1865. Yet the Supreme Court of Kansas, in the case of *Veal* v. *Maynes*, 23 Kan. 1, in construing this Treaty of 1861, with the Pottawattomi tribe, held the only title granted to the Indians was that of possession with the fee in the United States, and that the United States and the tribe could subsequently make any dis-

position of these lands so assigned under said treaty as they deemed advisable and saw fit to do.

The opinion in both of these cases was written by Chief Justice Brewer, and we ask the court's careful consideration of the same, as these opinions go fully into the various questions of law relative to the title the Indians received under these various treaties.

The court of appeal's attention was not called to these decisions and its attention was not called to these various other treaties of a similar nature made with various other tribes, and we believe that had its attention been called to these matters it would have reached a different conclusion.

The opinions of Judge Shiras, in *Sloan* v. *United States* (C. C.) 95 Fed. 193, 196, and *Sloan* v. *United States*, 118 Fed. Rep. 283, who was in active touch with Indian affairs and the policies of the United States, with reference to its dealings with the Indians when the Treaty of 1865 and the Act of 1882 were enacted, are in harmony and keeping with the decisions of Judge Brewer in the aforesaid Kansas cases and are in harmony with the policy and acts and the construction of the Indian department and the Secretary of the Interior with reference to the Treaty of 1865 and the Act of Congress of 1882 and similar treaties and acts of Congress with other tribes of Indians entered into at about this period.

These decisions of Judge Shiras are in point in the case at bar regardless of the comments of the court of appeals thereon. The writer of this brief was one of the attorneys for interested parties in the case of *Sloan* v. *United States*, 118 Fed. 283, and one of the questions involved therein was the right of certain mixed bloods to allotments. The mixed bloods insisted they had certain vested rights to allotments under the Treaties of 1830, 1854 and 1865, with the Omaha Tribe of Indians, and Judge Shiras in deciding this question held the aforesaid Act of 1882, providing for allotments in severalty,

suspended all prior acts and treaties with the Omaha Tribe of Indians on the subject, and all subsequent allotments are governed solely by its provisions, and that said mixed bloods could not predicate any rights on any treaties with the Omahas or acts of Congress prior to Act of 1882.

It is to be noted that in none of these later acts of Congress dealing with these same Indian tribes and these same lands has the Indian been given as large and complete a title as that contended for by plaintiff in case at bar with the Omahas under the Treaty of 1865. The United States does not to this day think these Indians as a body are capable and competent to receive as full and complete a title to these lands as plaintiff contends they received fifty years ago. It seems unreasonable to suppose the United States fifty years ago intended to give the Omaha Indians and other various tribes of Indians with which it negotiated at this period, a fee title to their lands as contended for by plaintiff and decided by the court of appeals, when up to the present time it has not seen fit to give any of these Indians a title to the fee in these lands.

Plaintiff has cited many cases showing good titles to parties of the lands of an Indian tribe to individuals by treaty between the United States and an Indian tribe, and in order for title to pass it is not always necessary for a patent or certificate to be issued from the executive department of the United States and that such conveyance may include the fee title. We have no criticisms to make of these decisions. Such conveyances have frequently been made, but in all such conveyances appropriate and proper words and definite descriptions were used to indicate the United States and the tribe intended to convey a fee title. These cases are not in point, as this is not a question of title conveyed by the United States and the tribe to a third party, but it is a question of interpretation of an act of Congress and a treaty between the United States and the tribe of itself with reference to its location upon certain lands and the policy of the Government with

reference to said tribe upon that reservation, which is an entirely different question and for that reason the cases cited by plaintiff are not in point.

For the foregoing reasons we respectfully ask that the decision of the Circuit Court of Appeals be reversed.

O. C. ANDERSON,
Attorney appearing Amicus Curiae.

CHARLES J. KAPPLER,
Of Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES

Number 447. 146

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN OF THE OMAHA TRIBE OF INDIANS, AND OF ROSE WOLF SETTER, A MEMBER OF SAID TRIBE, PETITIONER,

VS.

HIRAM CHASE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF HARRY L. KEEFE (OF KEEFE & KNOEPFLER) APPEARING AMICUS CURIAE.

WEKESSER, The Brief Man, Lincoln, Nebraska

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STATEMENT.

The undersigned, writer of this brief, appears in this case *amicus curiae* for the reason that he is appearing as counsel for defendants in the case of *Nellie Springer, et al.* v. *Will L. McNeill*, No. 576 Law, United States District Court, Omaha Division, also in the case of *George F. Rasch* v. *Hiram Chase, et al.*, No. 114 Equity, United States District Court, Omaha Division, and also in several other cases wherein the question of the validity of claims under the Treaty of March 6, 1865, is denied.

The facts are fully set forth in the pleadings and statement of counsel for the Government and will be referred to in this brief only for the purpose of illustration.

ARGUMENT.

The reasons hereinafter set forth why the claim of defendant, Hiram Chase, ought to be denied, fall logically under three main heads as follows:

I. The Treaty of March 6, 1865, with the Omaha Indians, did not grant by words or intendment a substantial title in fee to those receiving assignments of land thereunder.

II. Whatever right defendant, Hiram Chase, had in the land assigned to his mother, Clarissa Chase, was cancelled, relinquished, and surrendered by him.

III. The order directing judgment on the merits of the case in favor of defendant, Hiram Chase, should not be sustained without trial requiring him to prove his claim and permitting the Government as guardian of the Indians, to establish the rightful claimants in the fulfillment of its function.

The three general statements against defendant's position will be treated separately and somewhat at length, but the writer asks the indulgence of the court for the length of the brief for the reason that the claims presented by the defendant are somewhat intricate and novel.

I. The Treaty of March 6, 1865, with the Omaha Indians, did not grant by words or intendment a substantial title in fee, to those receiving assignments of land thereunder.

The defendant, in his claim, and the court of appeals, in its opinion, have rested the entire structure of the case upon the single assumption that the Treaty of 1865 granted to the Omaha Indians, taking assignments of land thereunder, fee simple title thereto, instead of the use in severalty which the tribe held in common. The court says that the question is one

for judicial and not legislative interpretation, but in reaching a correct, judicial interpretation of a statute or a treaty, in which the language is not clear, the courts have always turned to the status of the parties, and to the subject matter under consideration and to the purposes and objects of the legislation and to the contemporaneous official expressions of the legislature and the parties treating, in order to reach the true intention and meaning of the act or treaty under consideration.

It must be conceded that all title to these lands was vested originally in the sovereign government exercising jurisdiction over them, and that any grant or conveyance of any right or interest must be made by the Government in terms clearly intended to express such grant, and that no title is conveyed by presumption where the terms of the instrument do not warrant the interpretation of a grant. The recognized Indian title is that of occupancy and any legislative intention to enlarge the same would have been expressed in unmistakable terms.

Veale v. *Maynes*, 23 Kansas 27.
Johnson v. *McIntosh*, 8 Wheaton 604.

It is not denied that the Indian tribe originally held no title to the land it occupied except the right to use and occupy, and when its tribal holdings were divided and assigned in severalty by authority of this Treaty of 1865, the individual allottee took only the right which the tribe held in common, namely, the right to use and occupy, surrounded by additional restrictions and safeguards.

Doe v. *Wilson*, 23 Howard 463.
United States v. *Cook*, 19 Wallace 693.

While the Government, prior to the Act of March 3, 1871 (16 Stat. 544), recognized the Indian tribes as separate communities and made and executed treaties with them, still such recognition was always that of a dependent, primitive people in a state of pupilage an dsubject at all times to the paramount power and authority of the United States. There was

never accorded to these tribes by the Government any of the elements of a sovereign people.

Cherokee Nation v. *Southern Kansas Railway Co.*, 135 U. S. 641.
Stevens v. *Cherokee Nation*, 174 U. S. 445.
Hitchcock v. *Cherokee Nation*, 187 U. S. 29.

It was held in *Wiggan* v. *Conolly*, 163 U. S. 56, in a similar case, that after the assignment of land in severalty, the lands of the Indians were still under the care, charge and protection of the nation and tribe and that no individual had the right to dispute such authority.

Plenary power exists in Congress to govern the property of Indian tribes. The power is a political one, not subject to the control of the judicial department. The power exists in Congress to abrogate the conditions of an Indian treaty.

These extraordinary powers are vested in Congress over the affairs and property of Indians because they are wards of the Government, because they are a dependent people and because the Government has undertaken a policy of civilization and development for them. The Government has assumed the obligation of the Indian's protection and civilization, and from this obligation arises the power to enforce its policy.

United States v. *Kagama*, 118 U. S. 375.
Thomas v. *Gay*, 169 U. S. 264.
Lone Wolf v. *Hitchcock*, 167 U. S. 553.
Ward v. *Race Horse*, 163 U. S. 504.

The assignment of land in severalty to Indians by the United States is but one of the instrumentalities employed in their development and until the United States finally parts with the title and dissolves their tribal relation and emancipates them, their land, even though assigned in severalty, is under the exclusive control of the executive branch of the Government.

United States v. *Rickert*, 188 U. S. 432.
United States v. *Celestine*, 215 U. S. 278.
Tiger v. *Western Investment Co.*, 221 U. S. 298.

From the above authorities it will be observed that the question of whether or not a fee simple title passed under the Treaty of 1865, must be considered from the standpoint of the dealings of a guardian Government with its wards, its purposes and objects, its power and authority and its policy extending over the period of guardianship.

The first treaty with the Omaha Indians, July 15, 1830, (7 Stat. 328), had reference only to the ceding of certain lands to the United States and the payment to the tribe of certain funds and other considerations therefor. The treaty also makes provision in article X for the half-breeds of the tribe, giving them a certain separate reservation. This assignment was in fee simple and the treaty so stated. Had it been the intention to give the Omaha Indians a fee simple title under the Treaty of 1865 similar language would have been used.

By this early treaty the Government enunciates its policy toward the Omaha Indians and undertook the education of their children and the introduction of industries among them. The predominating desire seemed to be to inaugurate a policy of education and advancement.

The next treaty which the Government made with the Omahas was that of October 15, 1836 (7 Stat. 524), which provided for the ceding of certain lands and the payment of money, and that the Government should break up and cultivate for the Omahas certain lands. This treaty marked the second step in industrial development of these people.

The third Omaha treaty was that of March 16, 1854 (10 Stat. 1043), and it was therein provided for a definite reservation for the tribe and the payment of $100,000 to be expended for their moral improvement and education and their advancement in civilization, and to provide them with homes and tillable farms and farming equipment. This treaty also provided that the president might assign to individuals and families of the tribe tracts of their land from 80 acres to 640 acres in

extent, and also to provide rules insuring the permanence and perpetuity of the homes to the Indian families, and also authorizing the issuance of a *patent* to such person or family —with restrictions against alienation—and providing further for the cancellation of such patents if the allottee abandoned the land. The treaty also provided for the erection, by the Government, of mills and shops and for the maintenance of tradesmen and experienced farmers to teach the Indians the arts and industries for their advancement and civilization.

The Government made provision in each treaty for some new inducement to encourage these Indians to adopt the habits of civilized life. It is significant to note that while land was assigned in severalty and even patents were issued, still the grant was merely the use and benefit, with the power in the Government to cancel the holding at will.

The last treaty of March 6, 1865 (10 Stat. 667), provided for the sale of a portion of the Omaha Reservation to the Government for the Winnebago Indians, and the additional expenditure by the Government of $50,000 for stock, improvements and farming equipments for the Omahas. Then appears Article IV of this treaty, the ambiguity of which has caused this litigation.

Now let us look this paragraph squarely in the face and by careful analysis determine what it means.

The subject matter of the article logically falls into four subdivisions as designated below:

> 1. "Article 4. The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes.

2. "And that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians. The lands to be so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary.

3. "The whole of the lands assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation, within and over which all laws passed or which may be passed by Congress, regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent of Indian affairs or the agent for the tribe.

4. "Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him, shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress."

We shall consider these subdivisions separately by number.

Number one describes the object and purpose of the following provisions and is not in controversy. It makes no hint of title, but its provisions should be considered because it embodies the policy of the Government in the development of the Indian. It defines the desire to promote settled habits

of industry and enterprise and to abolish their communal and tribal life, as the goal of Indian civilization. This end is to be accomplished by an experiment in the possession of land in severalty. In the former treaty they were promised patents if they would remain on the land but in this second attempt the Government proceeds with more caution.

The second subdivision designates the amount to be *assigned* to individuals, making provision for their respective needs, giving each some timber for his use and encouragement—thus carrying out the purpose and object of the governmental policy. There is little dispute over the interpretation of this subdivision but it must be noted that the only term of conveyance thus far used is the word "assign." No suggestion of an allotment, a grant or a conveyance—merely an assignment, which distinguishes the tract used by one Indian from that used by another. This designation is significant.

Number three gives us no clew to the title passed—except that the land assigned and unassigned is designated as a reservation, from which unauthorized white men are excluded. But over the whole reservation Congress has drawn a little closer the authority of the United States, exercising in the pursuit of its policy a more strict proprietorship over the Government's land, upon which these people are being taught the lessons of civilized life. This increased governmental authority is not consistent with the fee title claimed by defendant. See the letter of the Secretary of the Interior of January 15, 1900, addressed to the Commissioner of Indian Affairs, relative to an appeal of Thomas L. Sloan, attorney, from the Commissioner's Office concerning the claim for allotment of the heirs of Rosalie Woodhull and Mrs. Hiram Chase (3173, Office Indian Affairs, 1900). Also the letter of the Secretary of the Interior of July 18, 1901, from the Secretary to the Commissioner of Indian Affairs relative to the same subject (Ind. Div. 4219—1901). This opinion was carefully prepared by a member of the present supreme court, acting as assistant attorney general, and refers to the identical piece involved in this case.

Now let us consider the fourth and last subdivision which has led defendant into so much gloom of obscurity. The first sentence provides that the Secretary of the Interior shall direct the division and assignment of these lands among the Omahas. In other words, it is not to be given, granted or conveyed to them but it is to be divided and assigned among them; their tribal title of use and occupancy partitioned in severalty and when this is accomplished the division and assignment shall be final and conclusive. The claims of the individual Indians shall be finally settled and concluded. The Government and its officials are not thereby estopped. There can be no controversy about that sentence. The term "final and conclusive," as applied to a Government function exercised by the executive branch of the Government toward Indians, was construed in the case of *Lane* v. *The United States ex rel. Mickadiet*, 241 U. S. 201. In that case the court considered these terms applied to a jurisdictional act and held that the Government could not be concluded and that such terms could not be applied to exclude governmental authority. This interpretation is applicable in this acse. The Government is not finally concluded by its act but those who would dispute the division and assignment made by the Government are concluded and the assignments are made final as to third parties.

Then it is next provided in this subdivision that the Commissioner of Indian Affairs shall issue certificates—not patents—for the tracts of land assigned, stating the names of the individuals and that they are for the exclusive use and benefit of themselves, their heirs and descendants.

Now, if it had been intended by this to convey a title and divest the Government of its fee, the provision for the evidence of title would have conformed to the law in force. At that time there was in force the Act of Congress of July 4, 1836 (5 Stat. 111) which provides:

> "Sec. 6. Be it further enacted that it shall be lawful for the President of the United States, by and with the advice and consent of the Senate, to appoint a Secre-

> tary with a salary of $1,500 per annum, whose duty it shall be, under the direction of the President, to sign in his name and for him all patents for land sold or granted under the authority of the United States."

Besides this authority it is the well-known principle and custom that the public domain and the land owned by the Government is conveyed only through the Secretary of the Interior upon order issued through the General Land Office, and conveyances are to be signed by the president.

The Commissioner of Indian Affairs has no authority to convey title and has never had. His function has been principally to experiment with the Indians in their ventures into white civilization. Now why, if these Indians were to get a fee title by this unusual and unheard of method, was no provision made to give the Indians the lawful muniments of title and cancel and withdraw the lands assigned and conveyed from the doman of the Government through the Office of the Secretary of the Interior and the General Land Office? No authority exists by this treaty or by any law for the Secretary or the Commissioner of the General Land Office to act in completing the title claimed, while the Act of Congress of July 4, 1836, expressly directs that the titles shall be conveyed only over the signature of the president.

Thus far we find no shadow of a title except an "assignment" of land to be designated in the certificate for the exclusive use and benefit of an Indian and his heirs and descendants. This designation was not in the provisions of the treaty but a recitation to be inserted into the certificates given the Indians. The treaty provided for the certificates and what they should recite, but such recitation does not thereby become a part of the binding stipula ons of the treaty, any more than the title partakes of the provisions of the certificate. The court says we must look to the treaty and not to the certificates for the grant of title, and we shall therefore confine our search to what the treaty says it gives the Indian and not to what it says shall be recited in the certificate.

The only hint of title we have found thus far in the treaty is a provision for an assignment of land to an Indian to be final and conclusive with a certificate issued in his name by the Commissioner. Now let us examine the remaining provisions after the semi-colon.

The common rules of English rhetoric would divide this portion into two restrictive statements relating to the tracts of land assigned, both modified by the limiting words at the end of the sentence, "until otherwise provided for by Congress." The first is a prohibition against the alienation or disposition of these tracts except to the United States, etc., until otherwise provided for by Congress, and the second is an inhibition exempting these tracts from taxation, levy, sale or forfeiture until otherwise provided for by Congress.

Yet we find no words of grant or conveyance. Thus far the Indian has received nothing but an assignment of a tract of land. True these last words give us a little light on what might not be done with these tracts until otherwise provided for by Congress, but no comfort can be found for him who seeks the grant of a fee simple title. From the authorities heretofore cited we have seen that titles are not granted by prohibitions or restrictions but by plain, clear and positive terms of conveyance.

In the Treaty of 1854, there was some promise of a fee—a patent was suggested—but here we have nothing but an assignment—no grant. The Treaty of 1854 granted as much title as the Treaty of 1865, with the additional promise of a patent—but even this title was subject to cancellation by the president if the Indian abandoned the land, even though a patent had been issued to him. We will find from further authorities that the fundamental element of a fee title is that it is non-forfeitable and indestructible forever, while this Treaty of 1863 exprsesly provides that its exemption from forfeiture extends only "until otherwise provided for by Congress."

The irresistible conclusion follows that when Congress provides otherwise the tract assigned becomes subject to dis-

position and forfeiture. The right given the Indian in the tract assigned lacks not only the essential element of perpetuity but it carries within it an expressed provision for its own termination.

From all of these treaties there can be gathered but one purpose on the part of the Government as expressed in the nature of the right conveyed to an Indian in the land he occupied, and that was a policy of encouraging him to use the land for the development of the home instinct by fostering settled habits of industry but never parting with the fee title to him. The extent of the right conveyed was at the very most a use and benefit, which falls far short of a fee title. The limited right to use and occupy was in harmony with all treaties and legislative acts made with and for the benefit of Indian tribes by the Government in its early policy and dealing with them.

Goodman v. *Buffalo*, 167 Fed. 818.

But all of these titles, uses, benefits, restrictions and provisions were swept away and superceded by the allotting Act of August 7, 1882 (22 Stat. 341).

Sloan v. *United States*, 95 Fed. 193; 118 Fed. 288.

The coming of this act of Congress was promised in the Treaty of 1865, the provisions of which were held in abeyance "until otherwise provided for by Congress."

But before leaving the consideration of the rights passed by the assignment under the treaty, let us consider how the Indians view these rights.

Before the Act of Congress of August 7, 1882, was ever conceived and while the Omaha Indians held no rights except those conferred by this Treaty of 1865, fifty-three of the leading heads of families addressed to the United States Senate the following petition, found in the Report of the House of Representatives, 4th Congress, First Session, Report No. 1530, relative to the sale of a part of the Omaha Indian Reservation in Nebraska, which was a report on the act that developed into the Alloting Act:

"To the Senate of the United States: We, the undersigned, members of the Omaha tribe of Indians, have taken out certificates of allotment of land, or entered upon claims within the limits of the Omaha reserve. We have worked upon our respective lands from three to ten years; each farm has from five to fifty acres under cultivation; many of us have built homes on these lands, and all have endeavored to make permanent homes for ourselves and our children.

"We therefore petition your honorable body to grant to each one a clear and full title to the land on which he has worked.

"We earnestly pray that this petition may receive your favorable consideration, for we now labor with discouragement of heart, knowing that our farms are not our own, and that any day we may be forced to leave the lands on which we have worked. We desire to live and work on these farms where we have made homes, that our children may advance in the life we have adopted. To this end, and that we may go forward with hope and confidence in a better future for our tribe, we ask of you titles to our lands.

"Respectfully submitted,"

These fifty-three leading Omahas who signed this petition included the members of the then Tribal Council, as the writer is informed, and the majority of the signers of the treaty who were then living. It was therefore fully and officially representative of the sentiments of the Omaha Tribe. In the petition these Indians declare that they have worked and built permanent homes and wish to continue to live on and preserve them for their children so they might advance in their adopted life. They say "We know we now labor with discouragement of heart, knowing that our farms are not our own, and that any day we may be forced to leave the lands on which we have worked," and they ask for clear, full titles to these lands.

Now, defendant, Hiram Chase, was a member of this tribe and was bound by this official expression of the nature and quality of the tenure under which the Omaha Indians held their land. Surely the Omahas never believed that they received or held a fee or vested right under the treaty—else they would not have feared eviction. A vested fee title,

coupled with possession, would have entitled them to defy the world. Attached to this petition or memorial is a statement by each of the fifty-three signers, describing his accomplishments and needs—his fears, his hopes and his aspirations. Each breathes the fear of eviction and the unstable rights to the land assigned him, and prays for a title.

We have also before the court the petition of Matthew Tyndall and a large number of other Omaha Indians, dated January 12, 1878 (Omaha file Nebraska, No. 23—1878), addressed to the Commissioner of Indian Affairs, in which the petitioners set out their complaints and the precarious condition of their tenure and asked for a more stable title. The answer to this petition, dated Jun 24, 1878, from the Commissioner Office (see certified copy from letter book, Volume 142, page 409), is significant of the attitude of the Government relative to the matter at that time. The letter of a number of Omaha Indians, dated November 16, 1879, consisting of a petition for title (see certified copy of file, Indian Office Nebraska, Omaha, 51—1879), is very significant of the attitude of the Indians toward their titles. Later we have the letter of Alice C. Fletcher of February 4, 1882 (File No. 3632—1882), which describes the attitude of the Indians toward their titles and is a valuable authority, owing to the fact that she was working among them as an authorized agent of the Government, gathering information in an official capacity.

We have also the petition of Joseph LaFlesche, dated July 2, 1880 (Indian Office File, Nebraska, L-905—1880), a certified copy of which is filed in this case.

One of the most reliable documents setting forth the true attitude of the Indians we find in the Indian Office Report of 1878, at page 95. Here we have the report of Jacob Vore, United States Indian Agent over the Omaha Indians to the Commissioner of Indian Affairs, dated July 29, 1878. In this report the Indian Agent comments at length upon the advancement made by the Indians in an industrial way, showing their progress in farming and also the progress made by them in education in the Government schools and the moral condition,

all of which gave great promise of advancement. The only comment showing an unsettled condition related to their titles and we quote as follows:

> "The frequent changes in the treatment and modes of managing and governing the Indians are derogatory to their progress in civilization and self-reliance. They tend to unsettle and discourage them from making the effort to improve their present homes that many of them would feel more interested in making if they could be fully assured that they were to remain their own, and that they were working for themselves and their children. They say that they have been faithful on their part in complying with their promises and obligations to the government, and intend to continue to be so, and they ask a reciprocal compliance on the part of the government with its promises and treaties with them. They are often disturbed by rumors and probabilities of changes, either of their homes or their management, and they feel that either would be a great injustice, especially without their free and unenforced consent. They are quick to discriminate between justice and injustice; and they say they want to live in undisturbed peace on their own rightful possessions, and in friendship with their white neighbors, which is certainly asking no more than a generous and just humanity would accord to them."

It will be seen from this that the Omahas were unsettled and wished to hold their land under a more permanent tenure.

The report of United States Agent George W. Wilkinson, dated September 29, 1882, is also instructive, as will be seen from the following quotation from this report:

> "In 1854 by treaty they ceded their lands to the United States, reserving the lands they now occupy. In the fourth section of their treaty of March 6, 1865, they were permitted to take lands in severalty, to hold so long as they would cultivate the same, and their right to said land was to be evidenced by certificates issued by the Commissioner of Indian Affairs."

The above authorities are cited to establish conclusively the well-known attitude of the Indians relative to their titles. These establish clearly and unmistakably that the Indians, at all times, before and after the Treaty of 1865, knew and under-

stood that they had only the right to hold, use and occupy the lands of their reservation, first in common under tribal right and later the right to hold in severalty the lands for their use and benefit, with the authority vested in the Government to cancel the same and move the Indians to other reservations.

It is clear that there never was, prior to the Act of August 7, 1882, the belief among any of the Omahas that they held a fee simple title or the promise of such.

It is unnecessary to cite authorities to establish the doctrine of the court that treaties with Indian tribes must be interpreted in the light of the understanding that the Indians had at the time of the making of the treaty. If that principle is applied the treaty must be interpreted as conveying an unstable, indeterminate use and benefit, subject to cancellation at the will of the Government.

Now, let us consider the attitude and interpretation of the Government toward the rights held in common and in severalty by the Indians under the Treaty of 1865.

The certificate issued under the treaty is the best evidence of the interpretation placed by the Secretary of the Interior upon the right conferred under the treaty. This certificate guarantees immediate possession of the land and the right to occupy it, but the United States withholds the title in trust for the use and benefit of the certificate holder and his heirs, so long as they shall continue to occupy the premises. While we must agree with the circuit court of appeals that title may be conveyed by treaty and that the certificate conveys no other or different title than that authorized by the treaty, still the certificate is the best evidence of the interpretation placed upon this right by the Secretary of the Interior. We have seen in *McKay* v. *Kalyton*, *supra*, that the Secretary of the Interior is a tribunal having exclusive jurisdiction to determine the rights and titles in Indian affairs. We therefore have from the highest authority in Indian affairs a direct interpretation of the nature of the rights vested under the

Treaty of 1865. The construction given a statute or treaty by the executive branch of the Governmetn which is charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without the best of reasons.

United States v. *Moore*, 95 U. S. 763.

The opinion of Thomas Ryan, Acting Secretary of the Interior, dated January 15, 1900, is also important and should be considered, together with the opinion of E. A. Hitchcock, Secretary of the Interior, dated July 18, 1901, both previously referred to and both establishing the attitude of the Government.

In response to a request from the Secretary of the Interior a complete history of the title to the land in litigation was made by W. A. Jones, Commissioner of Indian Affairs, dated July 29, 1901 (Land 39045—1901). A certified copy of this letter will be filed with the Department and is worthy of consideration because it sets out clearly the steps in the transactions by the Government with Clarissa Chase and her heirs. This is also cited as an additional authority to show the interests of others besides defendant, Hiram Chase.

Many other authorities and expressions of the Government might be cited, showing that at all times it was the decision and opinion of the executive and legislative branches of the Government that no title was conveyed under the Treaty of 1865, except the use and benefit.

In the consideration and interpretation of the rights of Rose Wolf Setter under the Act of Congress of August 7, 1882, as against the claims of defendant, Hiram Chase, the circuit court of appeals, in its opinion, proceeds upon two assumptions, the first of which emphasizes and applies broadly and generally as a restriction on all grants of that act, the language in the fourth section of that act, which provides, "that any right in severalty acquired by any Indian under existing treaties shall not be affected by this Act." The court

asserts that this provision was a recognition by Congress that the allottee secured a fee simple property interest under the Treaty of 1865. The circuit court of appeals by this assumes without analysis that the intention and purport of this language was to make the allotment claim of Rose Wolf Setter, under the Act of 1882, subject and inferior to the claim of defendant, Hiram Chase, under the Treaty of 1865. This position was undoubtedly the determining factor with the court in reaching the conclusion that the treaty conveyed a substantial right in perpetuity which ought not to be affected by tribally approved legislation and allotment thereunder. We propose to show that this premise was false and that the resulting conclusion is unsound.

That provision of the Act of August 7, 1882, providing "that any right in severalty acquired by any Indian under existing treaties shall not be affected by this Act," comes at the end of section 4 and was intended to limit only the provisions of that section which have reference to the land lying west of the Sioux City and Nebraska Railway Company's right-of-way and which was thereby authorized to be, and was sold for the benfit of the Omaha Tribe of Indians. The consideration of the Act of 1882 as a whole clearly indicates this intention.

Before the act was finally passed the fear was expressed by the Indians and their friends that the tracts selected under the treaty, which the Indians had improved for homes, might be sold under the provisions of the act providing for the sale of the land of the white settlers, and Congress inserted this reservation as an amendment to safeguard the selections and assignments and homes of the Indians against the sale and for no other purpose. That this limiting reservation was intended to apply only to section 4 is clearly shown in the debate and discussion of the bill in Congress. The bill came up before the Senate sitting as a Committee of the Whole on April 19, 1882 (see Congressional Record, 42nd Congress, 1st Session, pages 3027 to 3032, for discussion and quotations therefrom in this brief).

Senator Saunders, of Nebraska, in making a report on the bill stated:

> "The bill authorizes the sale of not exceeding 50,000 acres, to be taken from the west part of the Omaha Reservation. This land has no settlers upon it, as we are able to show from the papers and from the agent himself, and is yielding nothing to the Indians, nothing to the Government and nothing to the country."

Section 4 of the bill provided:

> "That when purchasers of said lands (the 50,000 acres to be sold) shall have complied with the provisions of this Act, as to payments, amount, etc., proof thereof shall be received by the Local Land Office at Neliegh, Nebraska, and patent shall be issued as in the case of public lands offered for settlement under the Homestead and Pre-emption Acts."

Following this main section of the bill, which was passed and became part of the act, the bill, as reported by the Committee on Indian Affairs, contained a proviso other than the one actually incorporated in the act. In the discussion upon section 4 and the original proviso, Senators Ingalls, Allison and others expressed a fear that the possessory rights of any Indians living on the 50,000 acres to be sold would be jeopardized.

Thus Senator Allison proposed:

> "Then a further provision ought to be inserted excepting the rights of the Indians to the fifty thousand acres, for the sale of which this bill provides, because here is an absolute direction that this fifty thousand acres shall be set apart by metes and bounds and appraised and sold. If a portion of this land is already occupied by individual Indians under the treaty stipulation, we should except and reserve so much of said lands as are so occupied."

Senator Dawes, of the Committee on Indian Affairs, aggreeing with Senator Allison, added:

> "I do not mean to assert that any of them are upon this land (the land to be sold); but it was thought wise to provide that if any Indian had located there he should be taken care of and not thrown out."

As a result of the discussion of the senators in the Committee of the Whole, Senator Dawes offered as a substitute for the original proviso annexed to section 4, the following:

> "Provided, that any right in severalty acquired by any Indian under existing treaties shall not be affected by this Act."

This proviso was accepted as a substitute and in explanation of it Senator Dawes said:

> "If by chance any Indian has gone, under existing treaties, upon any portion of this land that it is proposed to sell, and acquired under the treaty the right to have a certificate in severalty, it will not be affected by this, and when the land comes to be sold his right to 160 acres must be exempt from sale."

Senator Ingalls and others accepted the Dawes amendment as fully meeting their first objections.

No clearer proof than this could be adduced to show that the limiting proviso affected only section 4 and related only to the fifty thousand acres which were to be sold under the act. Senator Dawes, in his explanation above quoted, shows that there was no thought or intention that the limiting proviso should be a general one applying on all grants of the act.

These authorities clear this limiting provision of any application to the allotments under the Act of 1882; they eliminate entirely from our consideration the authority which the circuit court of appeals relied upon in holding that the assignments under the treaty partook of the nature of a permanently protected and perpetual grant.

It is clear that this expression of Congress, which was not submitted to or considered by the circuit court of appeals, deprives the discussion in this case of the fundamental argument used by defendant in bolstering up his pretended claim of a fee title under the treaty.

The discussion of Senate File No. 1255 in Congress, prior to its enactment as the Act of August 7, 1882, is also illumina-

tive in its expression of the understanding and intention of Congress as to the status of the lands of the Omaha Indians. Section 6 of the original bill provided:

> "That the Secretary of the Interior may, with the consent of the Indians expressed in open council, secure other reservation lands upon which to locate said Indians, cause their removal thereto, and expend such sum as may be necessary for their comfort and advancement in civilization, not exceeding $100,000, including cost of surveys and expense of removals, the same to be drawn from the fund arising from the sale of their reservation lands under this act."

It was recommended by the Committee on Indian Affairs that this entire section be stricken out and such an amendment was accepted. In explaining this amendment Senator Saunders said:

> "The reason for striking out section 6 is that it was found entirely unnecessary. The Indians are not proposing to leave that part of the country and settle elsewhere. They have plenty of land left, and propose to remain there; so that it was found entirely unnecessary to provide for their being settled in any other part of the country."

It is noteworthy that the one reason given for making such an amendment was that it was unnecessary, not that it would be an attempt to divest the Indian of any substantial title to the land. It indicates the accepted legislative understanding that the Omaha Indians obtained only a right to occupancy in severalty by the Treaty of 1865. In discussing the status of these Indian lands Senator McMillan said:

> "These are public lands owned by the Government of the United States. The Indians by reason of their relation to the Government occupy this particular land at this time as the wards of the Government, and not as citizens of the United States. The Government does not part with the title in fee simple, but permits the Indians, retaining still their relation to the Government, not as citizens, but as the wards of the Government, to enter upon the occupancy of this land under a qualified title. The conditions of that title are determined by the Government when the title, whatever its character, is acquired.

> The title is still in the sovereignty of the Government of the United States; and it can impose conditions."

Senator Dawes, after quoting a portion of the provisions of the Treaty of 1865, said:

> "It then goes on to stipulate that the Indian may have a paper or certificate that shall give him and his descendants exclusive occupation of this land. It was supposed by the committee, upon the information derived from the Nebraska Senators, that there were no Indians upon this land (the land to be sold), either in common or in severalty; but it was known to the committee that a portion of the Indians, thirty or forty of them, had gone upon the land somewhere and made a location which entitled them to these certificates which gave that exclusive occupation to them and their descendants."

In brief, wherever reference was made in any debate or discussion in Congress to the right acquired by the Omaha Indians under the Treaty of 1865, it was always referred to merely as a right to use and occupy, in common and in severalty; it was never referred to as a fee simple estate.

In deciding that a fee simple estate was granted by the Treaty of 1865, the circuit court of appeals, quoting from *Libby* v. *Clarke*, 118 U. S. 250, defines an estate in fee simple as "an estate in lands or tenements to him and his heirs forever," yet the right conferred under the treaty was to "themselves, their heirs and descendants." One of the characteristics of a fee simple estate, recognized in the foregoing definition, was that it was made absolute without any end or limit put to the estate (2 B. L. Com. 106). This is the idea expressed by the word "forever" in the definition quoted and approved by the circuit court of appeals. Where is there any indication in the grant made by the Treaty of 1865 that it was a grant "forever"? It lacks this essential characteristic of a fee simple. The words as given are no more indicative of a fee simple estate than they are of an estate for years or other estate less

than a fee, whereas the very language of the treaty in every way indicates a grant of occupancy only. *Libby* v. *Clark* was also referred to by the circuit court of appeals as holding that an estate in fee simple is not inconsistent with the restriction on alienation. The grant made by the Treaty of 1865 is likened to the estate before the court in *Libby* v. *Clark*. There is a marked distinction between the facts in the two cases. In the case of *Libby* v. *Clark* there was involved a treaty between the United States and the Ottawa Indians. The treaty provided that "it shall be the duty of the Secretary of the Interior to issue patents in fee simple to such land." The grant was clearly and unequivocally that of an estate in fee simple. There was an additional qualification in the treaty which was held to apply to the estate, namely, that the grantee could not alienate his lands until he became a citizen of the United States, but by an express provision of the treaty the Ottawas were to become citizens five years after the treaty was approved. Therefore, the restriction of alienation was for a definite period of five years only. The restriction imposed by the Treaty of 1865 was for no such definite and limited period; it was to extend "until otherwise provided for by Congress." Such restriction is, therefore, one of many indications that no fee simple state was granted by the treaty or was intended to be granted thereby. One of the chief incidents of a fee simple title is the power of alienation. It is the universally accepted rule that absolute and unlimited restriction on alienation of a fee simple title shall be null and void. This rule is supplemented by that laid down in *Libby* v. *Clark* and other jurisdictions wherein it is held that a limited restriction on alienation of a fee simple title, if for a fixed and reasonable time, is a valid restriction and not inconsistent with such a title. But in the case in hand the restriction is not for a definite, limited period; it is for an uncertain and unlimited period. Thus the well defined decision in *Libby* v. *Clark*, where a fee simple estate was clearly involved, where the restriction was for a fixed and limited period, is not available to the circuit court of appeals in establishing an analogy of the facts in issue.

II. Whatever right defendant, Hiram Chase, had in the land assigned to his mother, Clarissa Chase, was cancelled, relinquished and surrendered by him.

We have seen from the above consideration that these assignments in severalty under the treaty were made for the use and benefit of the individual Indians to induce them to adopt habits of civilized life. The tenure of their holdings was surrounded with protective limitations and were to continue only "until otherwise provided for by Congress." It has also been shown that the Government intended to convey only a use and benefit and that the Indians from the first understood the uncertainty and insecurity of their tenure and became dissatisfied therewith, and through their repeated requests, representations and petitions there resulted the allotment act provided for by Congress of August 7, 1882. This Act was promised in the Treaty of 1865 and it was passed at the request of the Omaha Tribe, of which defendant was then an adult member and became bound by the tribal acts; the act became effective only with the consent of the tribe expressed in open council, which consent was formally given and thereby became the consent and approval of this defendant and he was accordingly bound. Furthermore, defendant conformed to and availed himself of all of the provisions and benefits of the Act of Congress of August 7, 1882, by selecting and taking, as his allotment of land thereunder, the very identical premises, consisting of 160 acres, which his mother, Clarissa Chase, had selected and occupied under the treaty, except that he rejected the least valuable forty acres and took another and more valuable forty in its place. He took this allotment subject to those express provisions of the fifth section of the act, "which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas concluded March 6, 1865. * * * after which the certificates issued by the Commissioner of Indian Affairs, as aforesaid, shall be deemed and held to be null and void."

This allotment which the defendant took in lieu of his mother's assignment under the treaty, and which thereby rendered the certificate null and void, he has held and occupied for 33 years, enjoying the preference right accorded him under the alloting act to select the land assigned to and improved by his mother, and now he appears before this court and complacently demands additional rights under the treaty assignment and certificate of his mother, which he has already exercised and exhausted and which, by his own voluntary act, he has rendered null and void. By the selection and reallotment of three-fourths of his mother's treaty holding he has certainly cancelled all claim under the certificate. He might have selected the forty acre tract in controversy, but he preferred a better piece of land and exercised his election and privilege to reject this forty acre tract and take another and better tract.

From the opinion and briefs filed it appears that this feature of the case was not presented to or considered by the circuit court of appeals, but it is evident that it is a determining and vital factor and the record warrants its serious consideration.

Certified copies of departmental documents establishing the facts above charged will be filed in this court by the Government and they proclaim the facts of defendant's irreconcilable, inconsistent and untenable position more eloquently than could any advocate.

From these facts arises the irresistible conclusion that if any right or title of use or occupancy or any other claim under the Treaty of 1865 to the premises in controversy was ever held by defendant, Hiram Chase, his voluntary act of selecting a lieu allotment under the Act of 1882, operated as a complete cancellation and annulment of any such right or claim. It is contended seriously that his right or claim, of whatever nature, be it of use or occupation, contingent or vested, was by his said cancellation thereby "disposed of to the United

States" as provided in the 4th Article of the Treaty of 1865. For these reasons alone the demurrer should be sustained.

III. The order directing judgment on the merits of the case in favor of defendant, Hiram Chase, should not be sustained without trial requiring him to prove his claim and permitting the Government as guardian of the Indians, to establish the rightful claimants in the fulfillment of its function.

The defendant, Hiram Chase, rests his claim to the land in litigation upon his allegation that he is the sole heir of his mother, Clarissa Chase, but he pleads no finding, order or decree establishing his relationship as her sole heir. In fact, it is well known that he is not. The records of the Interior Department establish that there are other claimants with equally as valid claims to an interest in the estate of Clarissa Chase as those of defendant. (See the admission of defendant in the Estate of Me-gthe-tain Clay, filed by the Secretary of the Interior, a certified copy of which is filed in this cause.) From the record it appears that Clarissa Chase died about 1875, leaving her son, Hiram Chase, and her daughter, Paulina Chase, and that the said Paulina Chase has since died leaving lineal descendants. Claim is also made by the heirs of Paulina Chase to an interest in the Estate of Me-gthe-tain Clay, the mother of Clarissa Chase, as against the claim of Hiram Chase, in an action now pending in the United States district court for the District of Omaha entitled *George F. Rasch* v. *Hiram Chase, et al., Defendants*, 114 Equity.

Thus it appears that the defendant, Hiram Chase, asks this court to affirm the judgment of the circuit court of appeals ordering the district court to render judgment on the merits in his favor confirming his title to the land in question, without requiring proof of the validity of his claim to be the sole heir of Clarissa Chase.

We are not unmindful of the condition of the record and that the case is before the court on a demurrer which admits

the allegations of defendant's answer, but such admission is solely for the purpose of testing the sufficiency in law of the allegations of defendant's answer to sustain a cause of action.

The Government is charged legally and morally with the solemn duty and obligation of administering the use and benefit of Indian land to those entitled thereto.

United States v. *Kagama*, 118 U. S. 375.
McKay v. *Kalyton*, 204 U. S. 458.

This duty and obligation cannot be discharged by affirming the opinion of the circuit court of appeals in this cause and giving to defendant, Hiram Chase, the full use and benefit and title to premises which rightfully belonged, in part, at least, to another, even though the Treaty of 1865 passed a substantial right to the allottees thereunder. True it may be said that this action determines merely the superior claim to the use and benefit as between Rose Wolf Setter and defendant, Hiram Chase, and that others with claims equally as good as defendant's are not barred, but it must be remembered that before judgment is rendered in favor of defendant he should be required to establish by competent proof his claim to these premises as the sole heir of Clarissa Chase. It must also be borne in mind that the Government of the United States brings this action in the fulfillment of its treaty obligations and that, aside from the controversy between Rose Wolf Setter and Hiram Chase, there rests upon the Government the duty of passing these premises and their use and benefit to its wards entitled thereto.

Lane v. *United States ex rel Mickadiet*, 241 U. S. 201.
McKay v. *Kalyton*, 204 U. S. 458.

The judgment ordered by the circuit court of appeals prevents the Government from exercising this duty, obligation and function and ought not to be sustained.

Had the district court overruled the demurrer of the plaintiff, the Government would then have had the right to

file replication and proceed to trial and challenge in the trial court the truth of defendant's allegations of fact, and such right was not lost by defendant's appeal to the circuit court of appeals. If that tribunal held that plaintiff's demurrer was not well taken, the Government should then have been permitted to elect whether it would rest on its demurrer, or by replication proceed to trial upon the issues in the district court. For these reasons cited, we contend that the order for judgment on the merits in favor of the defendant should not be affirmed.

CONCLUSION.

Summing up the arguments presented in this brief, there have been presented three reasons warranting the denial of the claim of defendant, Hiram Chase. It has been contended (1) That the Treaty of March 6, 1865 between the United States and the Omaha Indians, did not grant by words or intendment a substantial title in fee to those receiving assignments of land thereunder; (2) That whatever right defendant, Hiram Chase, had in the land assigned to his mother, Clarissa Chase, was cancelled, relinquished, and surrendered by him; and (3) That the order directing judgment on the merits of the case in favor of defendant, Hiram Chase, should not be sustained without trial requiring him to prove his claim and permitting the Government as guardian of the Indians, to establish the rightful claimants in the fulfilment of its function.

It is submitted that any one of the three reasons presented warrants a reversal of the decision of the circuit court of appeals. Because of the far reaching effect of a decision herein particular attention, however, has been directed in showing that the Treaty of 1865 did not grant a substantial title in fee. The language of that treaty has been carefully examined from every standpoint. It has been shown to be contrary to the established policy of the United States in dealing with its Indian wards and subversive to the common rule of rhetoric to hold that a fee simple title was conveyed or intended to be conveyed by the Treaty of 1865.

Moreover, no such construction was placed on the treaty either by the executive department of the Government or the Omaha Indians or the Congress of the United States. And finally, when tested by the essential characteristics, incidents and tests of a fee simple estate there is no hint that such an estate was granted by the Treaty of 1865.

The second argument presented in this brief was that whatever right Hiram Chase, the defendant, had in the land assigned to his mother under the treaty, that right was cancelled, relinquished and surrendered by him. Attention has been directed to the fact that he voluntarily conformed to and availed himself of all of the provisions and benefits of the Act of Congress of August 7, 1882. He selected and secured the reallotment to himself of three-fourths of his mother's allotment, taking the balance of his allotment under the act in other and better land. By this voluntary act the defendant terminated the treaty rights of whatsoever kind, and the demurrer should be sustained for this reason alone.

Finally, it has been argued that the order of the circuit court of appeals directing judgment in favor of the defendant, Hiram Chase, on the merits of the case, is without warrant in view of the fact that the defendant should be required to prove his claim, and that the Government should be permitted, as guardian of its Indian wards, to establish the rightful claimants.

For the reasons set forth in the brief and reiterated and reemphasized in conclusion, it is respectfully urged that the decision of the circuit court of appeals be reversed.

HARRY L. KEEFE (Of Keefe & Knoepfler),
Appearing Amicus Curiae.

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN OF THE OMAHA TRIBE OF INDIANS, ET AL., *v.* CHASE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 146. Argued October 2, 1917.—Decided November 5, 1917.

The assignment of land provided for by Article IV of the treaty of March 6, 1865, 14 Stat. 667, with the Omaha Indians, was merely an apportionment of the tribal right of occupancy to the members of the tribe in severalty, leaving the fee in the United States and

leaving the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become appropriate in view of changing conditions, the welfare of the Indians and the public interests.

The facts that the treaty does not say that the fee shall pass, that it makes no provision for patents, and does not relieve assignees from federal guardianship or subject them to state laws, or dissolve the tribe, or abridge its power to speak and act for its members, while it does expressly provide that all the lands, assigned and unassigned, shall remain an Indian reservation, subject to the Indian trade and intercourse laws of Congress, and upon which white persons, other than federal employees, shall not be allowed to reside or go without written permission from the Indian agent or a superior officer, confirm this construction of Article IV.

This construction also is confirmed by the practical construction placed upon the treaty by the United States and the tribe, as evidenced by the terms of the certificates of assignment, the petition of a number of the assignees, including chiefs who had participated in the treaty, for a better tenure, the passage of the Act of August 7, 1882, c. 434, 22 Stat. 341, to become operative when consented to by the tribe, the acceptance of that act by the tribe, and the execution of the act through the surrender and accounting for outstanding certificates of assignment, and the making and acceptance of allotments under it—a construction of the treaty which has become practically a part of it and could not be now rejected without seriously disturbing the titles of those who not unreasonably relied upon it.

Possessory rights based on assignments made under Article IV of the treaty of 1865, *supra*, were terminated by the Act of 1882, *supra*. An assignee who failed to exercise his preferred right of selection waived it, and his assigned tract became allottable to any other qualified selector.

The provision in § 4 of the Act of August 7, 1882, *supra*, that "any right in severalty acquired by any Indian under existing treaties shall not be affected by this act" was not intended to qualify the plan of allotment defined in § 5, but only to prevent the sale under the earlier and separable portion of the act of tracts subject to Indian rights in severalty acquired under treaties.

A patent for an allotment issued under the Act of August 7, 1882, *supra*, in the name of an Indian who was dead at the time, inures to the benefit of his heir under § 2448, Rev. Stats.; the fact that the patentee had died before requisite proceedings had been taken

upon his selection would not render the patent void but at most voidable in an appropriate proceeding. Such a patent cannot be attacked by a mere occupant of the allotment in an action brought by the United States and the patentee's heir to recover damages for wrongful use and occupation of the premises.

222 Fed. Rep. 593, reversed.

THE case is stated in the opinion.

The Solicitor General for the United States.

Mr. Hiram Chase, pro se, and *Mr. Thomas L. Sloan,* with whom *Mr. William R. King* was on the brief, for respondent.

Mr. O. C. Anderson and *Mr. Charles J. Kappler,* by leave of court, filed a brief as *amici curiæ.*

Mr. Harry L. Keefe, by leave of court, filed a brief as *amicus curiæ.*

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is an action to recover for the wrongful use and occupancy of forty acres of land in Nebraska to which two Omaha Indians assert conflicting claims. The land is within the Omaha Indian Reservation, was assigned in 1871 under the treaty of March 6, 1865, 14 Stat. 667, to Clarissa Chase, a member of the Omaha tribe, and was allotted in 1899 under the Act of August 7, 1882, c. 434, 22 Stat. 341, to Reuben Wolf, another member of the tribe. The defendant, who has been using and occupying the land for some time, claims as the sole heir of Clarissa Chase, and the other claimant—for whom the United States sues as trustee and guardian—claims as the sole heir of Reuben Wolf. In the District Court judgment went against the defendant, but he prevailed in the Cir-

cuit Court of Appeals. 222 Fed. Rep. 593. Whether the assignment to Clarissa Chase under the treaty passed the full title in fee or only the Indian right of occupancy, and whether all right under the assignment was extinguished prior to the allotment to Reuben Wolf under the Act of 1882, are the controlling questions.

The reservation was established and maintained under early treaties as the tribal home. The Indian right of possession was in the tribe and the fee in the United States. The possessory right was enjoyed by all the members in common, none having a several right in any part of the reservation. While this was so the treaty of 1865 was negotiated. By it the tribe ceded a portion of the reservation to the United States and the latter, in consideration of the cession, engaged to make certain payments to the Indians and to take certain measures, not material here, for their benefit. The treaty then proceeded:

"Article IV. The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians.

The lands to be so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. The whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation, within and over which all laws passed or which may be passed by Congress regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent of Indian affairs or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him, shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress."

Some of the Omahas sought and received assignments under this article, while others, although having the requisite status, neither sought nor received anything under it. Clarissa Chase was among those who obtained an assignment of 160 acres as the head of a family, and in 1870 a certificate evidencing her assignment was issued to her by the Commissioner of Indian Affairs. The 160 acres included the 40 acres now in question.

Without any doubt the fourth article contains provisions which, in other situations, would suggest a purpose to pass the full title in fee. This is true of the provisions that the assignments, when approved by the Secretary of the Interior, "shall be final and conclusive," that the certificates to be issued by the Commissioner of Indian Affairs shall specify that the tracts assigned are for the exclusive use and benefit of the assignees, "their heirs and descendants," and that the tracts shall not be "alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe." But as applied to the situation then in hand these provisions are consistent with a purpose to apportion the Indian possessory right, leaving the fee in the United States as before. The assignments, when approved, could well operate as a final and conclusive apportionment of that right without affecting the fee; and the right of each assignee to occupy and use the tract assigned to him, to the exclusion of other members, could well pass to his heirs and descendants, upon his death, without his being invested with the fee. If not invested with it, he, of course, could not alienate it, and a cautious provision intended to prevent him from attempting to do so hardly would enlarge his right. True, the provision says, "except to the United States or to other members of the tribe," but, as the restriction is also directed against leasing or other disposal, it is not improbable that the real purpose of the excepting clause is to qualify this part of the restriction. In any event, the implication attributed to the provision is too uncertain to afford a substantial basis for thinking the assignee was to take the fee.

Other provisions and considerations suggest that an apportionment of the tribal possessory right is all that was intended. The article directly provides for a change in tenure—an "assignment or division" in severalty of communal property. Nothing is said about passing the

fee held by the United States, and there is no provision for patents. The assignees are neither relieved from federal guardianship nor subjected to state laws. And there is no dissolution of the tribal organization, nor any abridgment of the accustomed power of the tribe, as such, to speak and act for its members. But there is express provision that all the lands, assigned and unassigned, shall remain an Indian reservation over which the Indian trade and intercourse laws of Congress shall be in force, and upon which no white person, not in the employ of the United States, shall be allowed to reside or go without written permission from the Indian agent or a superior officer. All this persuasively points to the absence of any purpose to do more than to individualize the existing tribal right of occupancy.

A like question was presented and considered in *Veale* v. *Maynes*, 23 Kansas, 1, a case arising out of the treaties of 1861 and 1867 with the Pottawatomie Indians. The earlier treaty provided in language similar to that now under consideration for the assignment of portions of the tribal reservation to individual members in severalty and for the issue by the Commissioner of Indian Affairs of certificates for the assigned tracts, "specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs." Assignments were made and certificates issued under that treaty and thereafter the treaty of 1867 was negotiated. Following its provisions a tract assigned under the earlier treaty to one member was conveyed by a patent in fee to another. This was claimed to be violative of the right conferred by the assignment, but the right under the patent was sustained. Speaking for the Supreme Court of Kansas, and particularly referring to the earlier treaty, Mr. Justice Brewer, then a member of that court, said:

"Now what was intended by this division—that the title be thus divided up, or the mere matter of occupancy? Of course either was within the power of the contracting parties. They might provide for a division among the several Indians which should vest an absolute title in each, beyond the power of the tribe or the government to disturb without the personal consent of the individual; or they might provide for an individualizing of the right of occupancy, giving to each person a sole right of occupancy in a particular tract, a right guaranteed against invasion by any individual, but still within the power of the tribe as a tribe to convey by treaty. In other words, while that remained the tribal home each individual desiring it should have separate control of certain lands, yet subject to the ultimate power of the tribe to change their home and to make absolute conveyance of the whole body of lands. The power of the tribe, *as a tribe*, remained undisturbed over both the allotted lands and those held in common. That this was the intent and effect of the treaty, we are constrained to hold, and this notwithstanding many expressions which, if used in ordinary contracts between individuals, would have marked significance to the contrary.

" . . . At present it is enough to notice that the allottee remained a member of the tribe, and if the intention had been to enlarge his title from the ordinary Indian title, one of occupancy, to that of a fee-simple, the intention would, it seems, have been expressed in unmistakable terms. If, on the other hand, a difference was to be made in the mere manner in which the various Indians occupied the tribal home, it was enough that that difference was made clear, and language used to indicate that should not be carried to some further meaning."

In *Wiggan* v. *Conolly*, 163 U. S. 56, 63, where the rights of an allottee, who was still a tribal Indian, were restricted by treaty after the allotment was made, this court said:

"The land and the allottee were both still under the charge and care of the Nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge."

But if the terms of the treaty of 1865 be regarded as confused or uncertain the question still must be resolved in the same way, for the parties—the United States and the tribe—have in practice placed upon the treaty the construction to which we are inclined. In the certificates issued by the Commissioner of Indian Affairs and accepted by the assignees it was declared that "the said [assignee] is entitled to and may take immediate possession of said land and occupy the same, and the United States guarantees such possession, and will hold the title thereto in trust for the exclusive use and benefit of [the assignee] and—heirs so long as such occupancy shall continue." The obvious import of this is that the assignee was to have a right of occupancy, but not the fee. In January, 1882, a considerable number of the assignees, some being chiefs who had participated in the negotiation of the treaty and whose names were signed to it, memorialized Congress as follows (Sen. Misc. Doc., No. 31, 47th Cong., 1st sess.):

"We, the undersigned, members of the Omaha tribe of Indians, have taken out certificates of allotment of land, or entered upon claims within the limits of the Omaha reserve. We have worked upon our respective lands from three to ten years; each farm has from five to fifty acres under cultivation; many of us have built houses on these lands, and all have endeavored to make permanent homes for ourselves and our children.

"We therefore petition your honorable body to grant to each one a *clear and full title* to the land on which he has worked.

"We earnestly pray that this petition may receive

your favorable consideration, for we now labor with discouragement of heart, *knowing that our farms are not our own, and that any day we may be forced to leave* the lands on which we have worked. We desire to live and work on these farms where we have made homes, that our children may advance in the life we have adopted. To this end, and that we may go forward with hope and confidence in a better future for our tribe, *we ask of you, titles to our lands.*"

Shortly after the presentation of this memorial a bill providing for the sale of the western part of the Omaha Reservation passed the Senate. At that time the only provision in the bill having any possible reference to the existing assignments was a saving clause in its fourth section declaring that "any right in severalty acquired by any Indian under existing treaties shall not be affected by this act." In the House of Representatives four new sections were added, and in that form the bill became the Act of August 7, 1882, before cited. The new sections, 5 to 8, contain elaborate provisions for making allotments in severalty out of the unsold portion of the reservation, for adjusting the situation to which the Indian memorial invited attention, for the issue of trust patents and patents carrying the fee, for disposing of the surplus lands in the reservation and for ultimately bringing the Indians within the operation of state laws. The fifth section, the one providing for allotments and dealing with the existing assignments, was both comprehensive and easily understood. It was in the nature of a proposal and in terms required "the consent of the Omaha tribe of Indians, expressed in open council," to make it operative. Shortly stated, what it proposed was this: All unsold lands, including those theretofore assigned under the treaty of 1865, were to be available for allotments. The right to receive allotments was to be accorded to the members generally, including those holding assignments under the

treaty. The allotments were to be on a scale [1] of 160 acres to each head of a family, 80 acres to each single person over eighteen years of age, 80 acres to each orphan child under eighteen years and 40 acres to each other person under eighteen years. The Indians were severally to select the lands to be allotted to them, heads of families selecting for their children and the agent selecting for orphan children. These allotments were to be "deemed and held to be in lieu of" the assignments under the treaty of 1865, but each assignee, when selecting the lands to be allotted to him, was to be accorded "a preference right" to select the tract embracing his improvements. In short, all rights under the assignments, as such, were to be extinguished, and each assignee was to have the same right to take an allotment as was accorded to other members, but with a preferred right to make his selection in such way that his allotment would include his improvements. The sixth section provided for the issue of trust patents covering a period of twenty-five years, and for full patents conveying the fee at the end of that period.

The tribe, in open council, gave its consent to this plan of allotment and adjustment, and, through the cooperation of the administrative officers and the tribe, the plan was carried to completion. The report of the allotting agent shows that of the 297 outstanding certificates of assignment 230 were produced and surrendered and 67 were accounted for as lost by fire, flood or other accident, and that most of the certificate holders took the assigned tracts for their allotments—others selecting different lands. Thus it is apparent that the parties to the treaty—the United States and the tribe—have in all their dealings relating to the subject proceeded upon the theory that what was intended by Article IV and what

[1] The quantity of some of the allotments was subsequently enlarged with the consent of the tribe. C. 209, 27 Stat. 630.

was accomplished by the assignments under it was merely a distribution or apportionment of the tribal right of occupancy, leaving the fee in the United States and leaving the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests. This construction of the treaty by those who entered into it and to whom its proper administration and application were of obvious importance has become practically a part of it and could not be rejected now, after the lapse of many years, without seriously disturbing the titles of those who, not unreasonably, relied upon it.

Concluding, as we do, that the assignment to Clarissa Chase passed only the Indian or tribal right of occupancy, the remaining question is not difficult of solution. She took that right as it was held by the tribe, without enlargement or diminution. It was merely individualized. Upon her death, in 1875, it passed to the defendant, he being her sole heir. The Act of 1882, consented to by the tribe, put into effect a general plan of allotment which completely displaced the Indian right of occupancy and in that sense terminated all right under the assignment. Under that plan the assigned tract was available for allotments and the defendant was entitled to an allotment. He could select the assigned tract for his allotment—indeed, he had a preferred right to do so. He could exercise that right or waive it and select other lands. But he could not select other lands and also hold the assigned tract. He was entitled to one allotment, not two. If not selected by him, the tract in question would be open to selection by another. He does not assert that he selected it, or that he was denied the right to do so, or that he received less than a full allotment without this tract. But he claims that the assignment

passed the title in fee and in consequence was an insurmountable obstacle to the allotment of the tract under the Act of 1882. This claim, as has been shown, is untenable. All that passed by the assignment was a possessory right, and this was terminated by the Act of 1882.

Some reliance is had upon the provision in § 4 that "any right in severalty acquired by any Indian under existing treaties shall not be affected by this act." But this, as an examination of the act discloses, is merely a saving clause in that part of the act providing for the sale of a distinct portion of the reservation. If the provision be read in connection with what is said in § 5 in dealing with allotments and with assignments under the treaty it becomes manifest that it was not intended to interfere with or qualify the plan of allotment as defined in that section, but only to prevent the sale, under the earlier and separable portion of the act, of any tract to which an Indian had a right in severalty under a treaty. The legislative history of the act also sustains this view. See Cong. Rec., 47th Cong., 1st sess., pp. 3028–3032, 3077–3079.

According to the pleadings, Reuben Wolf died at some time after selecting the tract for his allotment and before the issue of the patent in his name, and this is set up as an obstacle to a recovery on behalf of his heir. If there be any merit in this objection, it does not render the patent void but only voidable. A statute in force for many years, and which this court has applied to a patent issued under an Indian treaty for Indian lands, provides that where the person to whom the patent issues is dead at the time the title shall inure to and become vested in his heirs, devisees or assigns, as if the patent had issued in his lifetime. Rev. Stats., § 2448; *Crews* v. *Burcham*, 1 Black, 352, 357. Thus the fact that Reuben Wolf was dead when the patent issued is in itself of no moment. If his selection had not advanced before his death to the

point where the patent properly could be issued thereafter that is a matter of which only the United States and the tribe can complain—and then only in an appropriate proceeding. Apparently both are content to let the patent stand, and certainly it is not open to the defendant to make the objection.

It results that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

It is so ordered.